SUPREME COURT OF THE UNITED [illegible]

OCTOBER TERM, [illegible]

No. [illegible]

J. L. HOWARD, ALIAS FRANK THOMPSON, [illegible] ALIAS GONEZ BONO, AND H. D. HAWLEY, [illegible] LANTS,

vs.

CAPTAIN J. M. FLEMING, WARDEN OF STATE'S PRISON OF NORTH CAROLINA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED APRIL [illegible], 1900.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 312.

J. L. HOWARD, ALIAS FRANK THOMPSON; A. L. DALY, ALIAS GONEZ BONO, AND H. D. HAWLEY, APPELLANTS,

vs.

CAPTAIN J. M. FLEMING, WARDEN OF STATE'S PRISON OF NORTH CAROLINA.

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1 In the United States Circuit Court for Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley, Petitioners,
vs.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina.

Be it remembered that on December 18th 1901 the petitioners above named applied to the Honorable Thomas R. Purnell, United States district judge for the eastern district of North Carolina, sitting as judge of the circuit court of the United States for the said district for a writ of *habeas corpus* upon their petition entitled in said United States circuit court for the eastern district of North Carolina and addressed to said the Honorable Thomas R. Purnell judge of said court and against Capt. J. M. Fleming, warden of the penitentiary of North Carolina, defendant; and which said petition was further in the words as follows that is to say:

"Your petitioners, J. L. Howard, A. L. Daly and H. D. Hawley, respectfully represent that they are citizens of the United States in this, to wit: That your petitioners, J. L. Howard and A. L. Daly are residents of the city of Chicago and State of Illinois, and your petitioner, H. D. Hawley, is a resident in and citizen of the State of New York; and that they are unjustly and unlawfully detained by Capt. J. M. Fleming, warden of the penitentiary of the State of North Carolina, situated at the city of Raleigh therein, by virtue of a mittimus or warrant of commitment issued by John J. Nelson, clerk of the superior court of Guilford county, in the State of North Carolina, and, as it is said, under the following circumstances, that is to say:

"At the June term, 1901, of the superior court of the county of Guilford, State of North Carolina, there was holden a session of said court and at the opening day thereof there was present to preside in and over said term of said superior court the Honorable W. B. Council, judge of the superior court of North Carolina, holding the courts of the fifth judicial district as the same was constituted prior to the first day of last July and in which district the county of Guilford was included; that the further organization of said court consisted of a drawing and empaneling of a grand jury and the drawing and empaneling of certain petit juries, but that neither the said grand jury nor any of the said petit juries were drawn and empaneled according to law. On the contrary, they were drawn in a manner contrary to and forbidden by the statute laws of this State. The law of this State provides that in each county a jury-box shall be kept, with two divisions, marked respectively No. 1 and No. 2, and that the county commissioners at stated intervals shall place the names of persons residing in said county, eligible and qualified for jury duty, and that the juries for each term of court shall be drawn indiscriminately from box No. 1, and, after service upon the jury at the term of court for which they were drawn, the

names of said persons shall be placed in box No. 2. The jurors drawn for service at the term of court aforesaid were not drawn indiscriminately from box No. 1, but were selected by the county commissioners from certain township boxes which the said commissioners had theretofore prepared. That there was no general mixing of the names of all the persons eligible for jury duty, nor was there in fact any mixing at all, but each township box was taken out by the county commissioners and certain names contained in the township boxes selected by the commissioners, and the venire so drawn was summoned for
2 attendance and did attend at the said term of said court, and the grand jury empaneled at the said term of said court was drawn from the venire selected as aforesaid, and to a large extent the petit juries also, contrary to section 13 of article 1 of the constitution of North Carolina, and to sections 1726 and 1727 of the Criminal Code of said State, and contrary and in violation of section 1, article 14, and section 1, article 15, of the Constitution of the United States. And that the said superior court of Guilford county, in drawing the jurors aforesaid and empaneling thereof the said grand jury for the said term of said court, by whom your petitioners aver the bill of indictment herein set out was found and returned unto said court as and for a true bill, an indictment in words and figures as follows:

"STATE OF NORTH CAROLINA,
Guilford County.

"Superior Court, June Term, A. D. 1901.

"The jurors for the State, upon their oath, present that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22d day of March, A. D. 1901, with force and arms, at and in the county aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest practices, in secrecy, with deceit and intent to defraud among themselves unlawfully, wilfully, fraudulently, feloniously and deceitfully did combine, conspire, confederate and agree together to divers false pretences and subtle means and devices, to obtain from one Paul Garrett large sums of money, and him, the said Paul Garrett, to cheat and defraud out of his moneys, goods and chattels contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

"Your petitioners further aver that upon the filing of said indictmen- in said court, no capias or warrant of said court issued, calling for the arrest of your petitioners, nor were your petitioners arrested and taken into custody by virtue of or in consequence of any warrant or capias issued by said superior court of North Carolina, but that your petitioners were unlawfully seized and taken before said superior court without warrant and thus required to answer said indictment so returned against them, on, to wit, June 5, 1901.

"Your petitioners further aver that said indictment so returned

against them in said court charges a conspiracy to cheat and defraud, which was not and is not an offense under the statutes and code of North Carolina; and that no such offense as charged was known to the common law of England prior to the Declaration of Independence, July 4, 1776, which said common law the said State of North Carolina adopted as a part of the law of said State, and that no such offense is known to the common law of North Carolina as adopted from England and as interpreted by the courts of said State.

"Your petitioners further aver that such of the law of England as related to conspiracy and which was adopted by the State of North Carolina was by the act of its legislature in the years 1835-'36 repealed, and that the legislature of this State has since then substituted therefor nothing touching the offense described in the indictment so found and returned against your petitioners.

"Your petitioners further aver that the criminal code of North Carolina assumes to cover all criminal offenses and to exclude all acts other than those described by its term as being criminal; and, under the terms of said code, no such crime as described and set forth in said indictment as justifiable or punishable by the courts of said State; and that such indictment charges no offense known to the law, statutory or other, of said State.

"Your petitioners further aver that at the June term of said court, 1901, said case was called for trial, and that then and thereupon, and before entering their plea of 'not guilty,' your petitioners moved to quash the said indictment on the grounds that said indictment, their apprehension and production before said court as aforesaid, was not due process of law; that in and by said indictment and their arrest as aforesaid your petitioners were denied the equal protection of the laws of said State of North Carolina, and that thereby the privileges and immunities of your petitioners as citizens of the United States were abridged, but which said motion of your petitioners the said superior court overruled and denied.

"That thereupon your petitioners at once moved the court to require the solicitor of the State to furnish them a bill of particulars of said indictment, which said motion was denied, and thereupon your petitioners were arraigned and pleaded 'not guilty' to said indictment, and their trial thereupon at once proceeded before said court, and men to the number of twelve, selected and drawn as petit jurors to serve in said court at said term in the manner contrary to and forbidden by the statute laws of the State as aforesaid—they, the said twelve men, being of the number of jurors so selected and drawn as aforesaid—the said court empaneled and swore as a petit jury in said cause, and before whom and said court your petitioners were forced to trial.

"That at the conclusion of the testimony offered by the State, your petitioners moved the court to be discharged, but which, their said motion, was by the court denied.

"That thereupon the said court gave its written charge to said jury in said cause, and therein and thereby violated the said fourteenth amendment to the Constitution of the United States, in this:

that in the face of the law of North Carolina, the judge of said superior court neglected and refused to charge said jury that in said State defendants in all criminal cases were then entitled to a presumption of innocence in their favor, which said presumption exists and remains until overcome by positive and affirmative evidence of guilt. That by section 413 of the Code of North Carolina the trial judge is required to put to the jury any and every hypothesis of fact embraced in instructions offered by defendants and to explain to such jury that such hypothesis is supported by the evidence and the law, or else to state to the jury wherein such hypothesis is not sustained by the law or the facts, either or both; but though defendants asked such a hypothesis in a series of instructions numbered from 3 to 13 inclusive, the court failed and refused to instruct the jury as to the hypothesis set out in said instructions; though said instructions so prayed embodied a state of fact which the evidence adduced tended to prove. That in violation of said section 413 in its charge the trial court singled out the prosecuting witness, Garrett and distinctly commended him and his acts to said jury.

"That in violation of the law of said State, said trial judge intimated to said jury his belief that the defendants were guilty, by stating in his said charge that if said defendants felt themselves aggrieved by the rulings and charge of said court, they might appeal to the Supreme Court.

Whereupon said jury found your petitioners guilty.

"That thereupon your petitioners moved the court in arrest and judgment, setting out as grounds for said motion, among others, that said indictment, arrest, trial and conviction of your petitioners was in violation of the fourteenth amendment to the Constitution of the United States, in that it abridged the privileges and immunities as citizens of the United States, they being citizens thereof; that it was not due process of law and that it denied petitioners the equal protection of the laws of North Carolina and as guaranteed by said fourteenth amendment, which motion was thereupon overruled; and the court sentenced your petitioners to terms in the penitentiary of North Carolina, as follows: Howard and Hawley for ten years, and Daley for seven years.

"That thereupon your petitioners objected and excepted to said sentence as being cruel and unusual and in violation of article 1, section 14, of the constitution of North Carolina, and of article 8 of the Constitution of the United States, and the said fourteenth amendment to the Constitution of the United States.

"That thereupon said superior court allowed your petitioners an appeal to the supreme court of North Carolina and fixed the bail of your petitioners, Howard and Hawley at $5,000 each, and Daly at $3,000; to which amounts petitioners objected as being excessive and in violation of said fourteenth amendment, which said objection said court overruled and petitioners excepted.

"That thereupon your petitioners were taken by the sheriff of Guilford county to and confined in the county jail thereof.

"Your petitioners further aver that pursuant to their appeal prayed and allowed as aforesaid, said cause came on to be heard in

the supreme court of said State to the August term thereof, 1901, and was there duly argued on behalf of the State and all of your petitioners, and wherein your petitioners presented and urged each and every of the points herein above mentioned and the violation of the constitutional provisions as above specified, and that said cause so submitted was by said supreme court taken under advisement; and that on December 3, 1901, the members of said supreme court filed their several and separate opinions in said cause, two of which were dissenting and for reversal of said judgment on the ground of the numerous errors as shown in said record and presented and urged in the argument of said case before them, and that a third separate opinion filed declared in favor of your petitioners on two points of error as presented in said record and argument, but still concurred in favor of affirmants of said judgment against your petitioners; but that the majority opinion of said supreme court filed in said cause wholly failed to pass upon the said objections and constitutional questions raised by your petitioners as aforesaid, as by said record and opinions, to which reference is here had, will more fully and particularly appear; and thereby said supreme court, in so affirming said judgment, denied your petitioners the equal protection of the laws of the State of North Carolina and abridged their rights and privileges and immunities as citizens of the United States, and that the same was not due process of law within the meaning of the fourteenth amendment of the Constitution of the United States.

"Your petitioners further aver that the said indictment, arrest, imprisonment, conviction, sentence and judgment in the superior court of Guilford county, and the affirmance by the supreme court of the State of North Carolina of said judgment of said Guilford county superior court were and are void, because the said indictment so illegally found and returned was not due process of law, that there was not charged in said indictment any offense known to the law, statutory or other, of said State, or justiciable or punishable by the courts of said State; and that in consequence the superior court of Guilford county was without jurisdiction of the subject-matter of said indictment or power or right or jurisdiction to adjudge the same an offense against your petitioners, or them guilty thereunder, or to impose any fine or penalty against your petitioners for or under said indictment, and said supreme court of North Carolina was without jurisdiction to affirm said sentence.

"Your petitioners further aver that the judgment of said Guilford court imposed a penalty on your petitioners greater than was ever imposed for the same or similar offense by any court in the State of North Carolina, and that the same is different in kind and servitude and in punishment ever imposed by any court in said State for like or similar offense, and that said judgment so affirmed by said supreme court is *ex post facto* and void under the Constitution of the United States, and that said supreme court is the highest court in the State to which your petitioners might or could appeal, and that they have exhausted their remedies therein.

"Your petitioners, therefore, aver that said proceedings and each

of them were and are and each of them was and is in violation of the 14th amendment to the Constitution of the United States, and that thereby and in the result thereof the rights of your petitioners as citizens of the United States have been abridged; that they have been denied the equal protection of the laws of North Carolina, and that they have been deprived of their liberty and property without due process of law, and that there has been imposed and inflicted and still is being imposed and inflicted a cruel and unusual punishment in this that on the 18th day of December, 1901, your petitioners, without the valid order or judgment of any court of the State of North Carolina, were by force taken to and imprisoned in the penitentiary of said State, at the city of Raleigh, in the county of Wake, where they now are in the custody and detained by Capt. J. M. Fleming, the warden of said penitentiary, under the pretended authority of a mittimus or warrant of commitment, issued as aforesaid; and copy of which is hereto annexed as aforesaid; and that they are so wrongfully, unjustly, forcibly and unlawfully detained against their right and constitutional privileges aforesaid and without legal warrant therefor.

"Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioners pray that a writ of *habeas corpus*, to be directed to the said Capt. J. M. Fleming, may issue in this behalf, so that your petitioners may be forthwith brought before this honorable court, that the cause of their said unlawful restraint, detention and imprisonment, as aforesaid, may be inquired into, and your petitioners to receive what the law may require, etc."

3 Ex. "A."

STATE OF NORTH CAROLINA,
Guilford County.

Superior Court, June Term, 1901.

Be it remembered that at a regular term of the superior court, begun and held for the county of Guilford at the court-house in Greensboro on the 3rd day of June, 1901, the following persons were convicted and sentenced to the State penitentiary.

STATE
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. DALY, alias GONEZ BONO, and H. D. HAWLEY.

Indictment, conspiracy, guilty.

Judgment of the court that the defendant J. L. Howard, alias Frank Thompson, be imprisoned in the State penitentiary for a term of ten (10) years.

Judgment of the court that the defendant H. D. Hawley be imprisoned in the State penitentiary for the term of ten (10) years.

Judgment of the court that the defendant A. L. Daly, alias Gonez Bono, be imprisoned in the State penitentiary for the term of seven 7) years.

I, John J. Nelson, clerk of the superior court of said county, do hereby certify that the foregoing is a true copy of the judgment in the above-entitled cause as same appears upon the records in my office, and I further certify that the certificate from the supreme court of North Carolina was received in my office this day.

In witness my hand and official seal at office in Greensboro this the 12th day of December, 1901.

(Signed) JNO. J. NELSON,
[SEAL.] *Clerk Superior Court.*

[Endorsed:] Howard *et al.* Commitment.

4 And thereupon on to wit: the said 18th day of December, 1901, the said Thos. R. Purnell, presiding as judge of said circuit court of the United States for the eastern district of North Carolina, upon the reading and filing with the clerk of said court the said petition granted thereon in said cause the following order, that is to say.

Order for Writ of Habeas Corpus.

"In the Circuit Court of the United States for the Eastern District of North Carolina.

"In the Matter of the Petition of J. L. HOWARD, alias FRANK THOMPSON; A. L. DALY, alias GONEZ BONO, and H. D. HAWLEY for Writ of *Habeas Corpus.*

"On reading and filing the petition of J. L. Howard, A. L. Daly and H. D. Hawley, duly signed and verified by them, whereby it appears that they are illegally imprisoned and restrained of their liberty by Capt. J. M. Fleming, warden of the penitentiary of the State of North Carolina, at the city of Raleigh, in the county of Wake, in said State, and stating wherein the illegality consists, from which it appears to me that a writ of *habeas corpus* ought to issue. It is ordered that a writ of *habeas corpus* issue out of and under the seal of the circuit court of the United States for the eastern district of North Carolina, sitting at the city of Raleigh, in said State, directed to the said Capt. J. M. Fleming, commanding him to have the bodies of the said J. L. Howard, A. L. Daly, and H. D. Hawley before me in the court-room of the said court, situated on the third floor of the Government post-office building in the city of Raleigh, on the 28th day of December, 1901, to do and receive what shall then and there be considered concerning the said J. L. Howard, A. L. Daly and H. D. Hawley, together with the time and cause of their detention, and that he have then and there the said writ.

"Dated at the city of Raleigh on the 18th day of December, A. D. 1901.

"THOS. R. PURNELL,
"*United States Circuit Judge.*"

5 And thereupon on to wit: December 19th, 1901, the clerk of the said circuit court of the said United States for the east-

ern district of North Carolina issued the writ of *habeas cor-us* in said cause under his hand and the seal of said court to Capt. J. M. Fleming, warden of the pen-tentiary of North Carolina, at Raleigh, and which said writ so issued is in the words and figures as follows, that is to say:

6 *Writ of Habeas Corpus.*

In the Circuit Court of the United States for the Eastern District of North Carolina.

In the Matter of the Petition of J. L. HOWARD, alias FRANK THOMPSON; A. L. DALY, alias GONEZ BONO, and H. D. HAWLEY, in the United States Circuit Court for the Eastern District of North Carolina, Sitting at the City of Raleigh, in said State, for Writ of *Habeas Corpus.*

The President of the United States of America to Capt. J. M. Fleming, warden of the penitentiary of the State of North Carolina, Greeting:

We command you that the bodies of J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, by you detained, and in person it is said, you have before our court at the city of Raleigh and in the rooms usually occupied by it as a court-room, on the third floor of the Government post-office building in said city, on the 28th day of December, A. D. 1901, at 10 o'clock a. m., together with the cause of the detention of the said J. L. Howard, A. L. Daly, and H. D. Hawley, to undergo and receive what our said court shall consider concerning them in this behalf; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, this 19th day of December, 1901, and in the 126th year of the Independance of the United States.

To the marshall of the eastern district of North Carolina to execute.

[OFFICIAL SEAL.] N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

[Endorsed:] Howard *et al.* *Habeas corpus* writ.

7 And thereupon said writ of *habeas corpus* issued as aforesaid directed to the marshal of said circuit court of the United States for the eastern district of North Carolina for service upon the said J. M. Fleming, warden of said pen-tentiary at Raleigh, was by the clerk of said court delivered to said marshal on the 19th day of December, 1901, together with a copy of the petition so filed in said cause and which said writ so executed and delivered with said copy of said petition said marshal on said 19th day of December, 1901, duly made service of on said Capt. J. M. Fleming, warden of said

pen-tentiary, and made return of due service thereof as appears on said writ, in the words following to wit:

8 Received December 19th, 1901, the within writ and executed the same by reading the same to Capt. J. M. Fleming and by leaving with him certified copy thereof together with a copy of the petition for the writ of *habeas corpus* at his office in the pen-tentiary of the State of North Carolina at the city of Raleigh therein. This 19th of December, 1901.

H. C. DOCKERY,
U. S. Marshal,
By J. T. SHARP, *D. M.*

9 And be it further remembered that on the 28th day of December, 1901, the said Capt. J. M. Fleming, warden of the pen-tentiary of North Carolina made his return to said writ so granted, issued and served as aforesaid into said court, producing therewith into said court the bodies of the petitioners aforesaid and which said return so made and filed with the clerk of said court by said respondent together with the exhibits thereto annexed is in words and figures following, to wit:

10 Circuit Court of the United States, Eastern District of North Carolina, at Raleigh.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ Bono, and H. D. Hawley, Petitioners,
vs.
J. M. FLEMING, Warden of State's Prison of North Carolina.

To the Honorable M. W. Fuller, Chief Justice of the United States, and the other justices of the above-entitled court, and to Hon. Thomas R. Purnell, United States district judge for the eastern district of North Carolina, sitting as circuit judge:

J. M. Fleming for his return to the writ of *habeas corpus* issued in the above-entitled cause by the Hon. Thomas R. Purnell, United States district judge, on December 18th, 1901, says:

That he admits that as warden of the State's prison of North Carolina he has in his custody the petitioners J. L. Howard, A. L. Daly and H. D. Hawley, and that they are detained in his custody as such warden by virtue of a mittimus or warrant of commitment issued by John J. Nelson, clerk of the superior court of Guilford county and, as your respondent is informed and believes, under the following circumstances: That on or about March 23rd, 1901, the defendants were duly arrested by one J. F. Jordan the sheriff of the county of Guilford, North Carolina, under and by virtue of a warrant duly issued by A. P. Eckle, an officer of the State of North Carolina, duly authorized to issue the same, charging petitioners with an offence against the criminal laws of the State of North Carolina, as will more
11 fully appear by reference to a copy of the said warrant which is attached to this return and is asked to be made a part thereof.

That respondent is informed and believes that on or about the 23rd day of March, 1901 the petitioners were duly brought before the said J. M. Wolfe, they having upon affidavit secured the removal of the cause from the said A. P. Eckle to the said J. M. Wolfe, who possessed the power of a committing justice under the laws of the State of North Carolina and could legally pass upon and hear the said warrant and hold the petitioners for the action of the grand jury of the superior court of the said county of Guilford, in said State. That after a due and regular hearing the said J. M. Wolfe, so acting in his official capacity had adjudged that there was probable cause of the guilt of the petitioners of the offence charged against them in the said warrant and thereupon further adjudged that the petitioners severally enter into bonds in the sum of three thousand dollars for their several personal appearances at the superior court of the said county of Guilford and State aforesaid, to be holden on June 3rd, 1901, and in default thereof that they be committed to the common jail of the said Guilford county, and issued a mittimus to the sheriff of Guilford county a certified copy of which is herewith filed.

That respondent is informed and believes that the petitioners failed to give their said several bonds for their said personal appearances at said term of court and were duly committed to the common jail of Guilford county to await the action of the said court.

That at said term of the superior court of Guilford county, the grand jury duly passed upon, found and returned as "a true bill" a bill of indictment in words and figures as follows, to wit:

STATE OF NORTH CAROLINA, }
Guilford County. }

Superior Court, June Term, A. D. 1901.

"The jurors for the State, upon their oath present, that
12 J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March, A. D. 1901, with force and arms at and in the county aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest practices, in secrecy, with deceit and intent to defraud, among themselves unlawfully, willfully, fraudulently, feloniously and deceitfully did combine, conspire, confederate and agree together by divers false pretenses and subtle means and devices, to obtain from one Paul Garrett, large sums of money, and him the said Paul Garrett to cheat and defraud out of his monies, goods and chattels contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

"Second count. The jurors for the State upon their oath do further present, that J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March, A. D. 1901, being persons of

fraudulent minds and evil dispositions and wickedly devising and intending to rob one Paul Garrett of his monies, goods and chattels, did unlawfully, wickedly and feloniously conspire, combine, confederate and agree together, in and upon one Paul Garrett in the peace of God and of the State then and there being, feloniously to make assault and him the said Paul Garrett, in bodily fear and danger of his life, then and there feloniously to put, and the monies, goods and chattels of the said Paul Garrett from the person and against the will of the said Paul Garrett, then and there feloniously and fraudulently to steal, take and carry away as by the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley had been mutually agreed and undertaken to
13 do; to the evil example of all good citizens and against the peace and dignity of the State.

Third count. The jurors for the State upon their oath do further present, that J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, being persons of fraudulent minds and dispositions and wickedly devising and intending to cheat and defraud the said Paul Garrett of his monies, goods, chattels and property, did on the 20th day of March, A. D. 1901, in the county of Guilford, aforesaid, feloniously, wickedly and deceitfully combine, conspire, confederate and agree together to cheat and defraud the said Paul Garrett of his monies, goods chattels and property as aforesaid by the false and deceitful color and pretenses as follows, to wit: by him, the said J. L. Howard, alias Frank Thompson, pursuant to a conspiracy, confederation and agreement theretofore had and made between him and his co-conspirators above named, falsely, fraudulently and deceitfully pretending and representing to the said Paul Garrett, that he, the said J. L. Howard, alias Frank Thompson, and his associate and confederate, Gonez Bono, alias A. L. Daley, were then and there the owners of and in possession of large blocks of gold as well as the owners of large and valuable mining interests in Arizona, which said gold was held by the said Gonez Bono on Buffalo creek, near the city of Greensboro, where the said Paul Garrett was then and there taken and the said blocks of metal then and there shown him; when the said J. L. Howard, alias Frank Thompson, pursuant to the conspiracy theretofore had and made, pretended that the said blocks of metal were solid gold 22 karats fine, and of the value of many thousands of dollars which they offered to demonstrate by a chemical analysis to be made by their said co-conspirator, H. D. Hawley, who was then and there waiting near by in the city of Greensboro with an assayer's
14 outfit to fraudulently and falsely analyze and assay said spurious metal and pronounce it pure gold, thereby aiding his co-conspirators in the execution of their common, fraudulent and felonious design to cheat and defraud the said Paul Garrett, in pursuance of a common conspiracy and confederation had and made by and between the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley. And the said J. L. Howard, alias Frank Thompson, then and there sought to dispose

of and sell to the said Paul Garrett the said blocks of metal for large sums of money; whereas in truth and in fact the said blocks of metal fals-ly and fraudulently represented to be gold were not gold but of a cheap and comparatively worthless metal, by means of which said false, fraudulent and felonious representations, the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and the said H. D. Hawley sought and attempted to obtain unjustly and unlawfully large sums of money from the said Paul Garrett contrary to the form of the statute in such cases provided, and against the peace and dignity of the State.

(Signed) "BROOKS, *Solicitor.*"

This indictment was regularly endorsed and returned "A true bill" by the foreman of the grand jury.

That upon the finding of the said bill of indictment by the said grand jury of the superior court of said county of Guilford the petitioners were directed by the judge of the said court therein presiding, to wit: Hon. W. B. Council, to be brought from the said common jail of said county to the bar of the said superior court of said county, then in regular session, due answer to make to the said bill of indictment. That thereupon the proceedings were had, which are set forth in full in the printed record of the defendant's statement of ca-es on appeal to the supreme court of North Carolina which is filed herewith, and which in all its parts is signed by the attorneys of record of the said petitioners herein and defendants therein, and which is asked to be taken as a part of this return in as full and ample a manner as if herein set forth word for word; and that your respondent is informed and believes that the proceedings therein and thereupon had in said court so sitting, in said action wherein The State of North Carolina was plaintiff and the petitioners herein were defendants, were in all respects regular and according to the due and orderly course and practice of the said court, under the constitution and laws of the State of North Carolina.

That replying to so much of petitioners' application for a writ of *habeas corpus* as states that the grand jurors and certain of the petit jurors at said term of said court were not drawn by the commissioners of the county of Guilford in the manner required by the statute laws of the State of North Carolina, your respondent states that he is advised and believes that the jurors from which the grand jury for said term of said court was selected, were drawn, chosen and selected in the way and manner in which the commissioners of said county of Guilford have done for many years; and that if petitioners are entitled to their release from imprisonment by reason of such irregularity in drawing the jurors then all the prisoners serving sentence under any judgment upon a verdict on a bill of indictment found in said county for many years are entitled to a release and discharge from their said imprisonments.

Further answering the respondent says that under the laws of the State of North Carolina and under the course and practice of its courts, the irregularities complained of, even if true, can be taken advantage of only before plea to a bill of indictment found by such

grand jury; that the petitioners herein and defendants therein
16 made no motion to quash the indictment and filed no plea in abatement and did nothing to legally take advantage of and claim any benefit or privilege growing out — said irregular manner of drawing said jurors. That it is true that the petitioners did in apt time move to quash the bill of indictment found against them but that the grounds upon which they based their said motion are fully set forth in the said "Case on appeal," and it is not true that they moved to quash the said bill of indictment for *nay* any irregularities or illegalities in the drawing or constitution of the grand jury which found said bill of indictment, or of the petit jury which tried the petitioners and which found them severally guilty of the offense charge- in the said bill of indictment. That when called upon to plead to the said bill of indictment so found by the grand jury as hereinbefore set out the defendants therein and petitioners herein entered their plea of "Not guilty" without having raised any objection to the manner in which the jurors were drawn by the county commissioners of said Guilford county, and that thereby, as this respondent is advised they waived any objection to the said grand jury and to the said petit jury, and to the manner in which said jurors were drawn and chosen.

Further answering the same the respondent says that he is advised that the alleged defect, or irregularity or illegality in the manner of drawing said jurors and in selecting and cho-sing them cannot be taken advantage of in this proceeding, and cannot avail the petitioners herein.

That affiant avers that upon the trial upon the indictment hereinbefore set out the petitioners were duly convicted upon the first count thereof, and found by the said jury so selected, sworn and empanelled without objection on the part of the petitioners to have been guilty as charged therein; that the petitioners then appealed to the supreme court of the State of North Carolina, and filed
17 therein a full and complete statement of the proceedings of said court as the record of said trial, and known as "Defendant's case on appeal," which was duly accepted by the solicitor prosecuting in said court on behalf of the State of North Carolina, a copy of which said case on appeal is filed as an exhibit herein, and that the petitioners took no exception, and made no objection to the proceedings, acts and doings of said court except such as are so set forth in the said case on appeal.

That after full argument and mature deliberation the supreme court of the State of North Carolina affirmed the judgment of the said superior court of the county of Guilford, holding and deciding that the bill of indictment did charge a criminal offence cognizable under the laws of the State of North Carolina and that the petitioners were duly and properly found guilty as charged therein. That a copy of the opinion of the supreme court of North Carolina so rendered by it and a copy of the judgment of said supreme court of North Carolina therein are filed herewith as exhibits and asked to be taken as a part of this return and answer.

That the chief justice of the supreme court of North Carolina

filed a dissenting opinion, expressing an opinion that the court below had erred in expressing an opinion on the weight of the evidence, and that for that reason there should be a new trial Reference is made to a copy of said opinion herewith filed.

That one other justice of the supreme court of North Carolina dissented from the opinion of the court, but in doing so he states that he is satisfied of the guilt of the petitioners of the offense charged, but thinks there should be a new trial for the error committed by the court below which he points out in his dissenting opinion.

That thereupon John J. Nelson, clerk of the superior court of said county of Guilford, as was his duty issued his mittimus
18 and committment in words and figures as shown by the copy attached to petitioners' application for a writ of *habeas corpus*, upon which petitioners are now held in custody by your respondent as warden of the State's prison of North Carolina.

Your respondent further avers, on information and belief, that the petitioners heretofore applied for writs of *habeas corpus* to two of the judges of the State of North Carolina, including Hon. D. M. Furches, chief justice of the supreme court of the State of North Carolina, who filed a dissenting opinion in the cause on its merits, declaring that the petitioners were entitled to a new trial, because of the expression of opinion by the judge who presided at the trial of the petitioners, and that said chief justice on the hearing of said writ of *habeas corpus* declared and determined that under the laws of North Carolina the bail required of the defendants was reasonable, just and legal and refused to alter or change the same, as did two superior court judges, who passed upon the same question.

That respondent is advised and so pleads that this court is without jurisdiction to hear and pass upon the several alleged errors, irregularities and illegalities set forth in the application of the petitioners, for that they severally arise under the constitution and the laws of the State of North Carolina and do not come within the purview of section 753 Revised Statutes *under which* of the United States, under which act this court derives its jurisdiction in the premises, in that the petitioners are not in custody in violation of the Constitution or of a law or treaty of the United States.

That respondent is advised and so pleads that the petitioners are not entitled to their discharge from the custody of respondent upon the facts stated in the application of the petitioners for that their remedy, if any they have, is by a writ of error to the Supreme Court of the United States and not by a writ of *habeas corpus*.

That respondent is advised and so pleads that the petition-
19 ers are lawfully in his custody as a just and legal punishment for their several heinous and aggravated crimes and felonies.

Your respondent further avers that the punishment imposed upon the petitioners is not unusual and is, as he is advised, fully authorized by the laws of the State of North Carolina. That upon the hearing before the Hon. W. B. Councill, the judge presiding, and who sentenced the said petitioners it appeared from facts that were before the said court, that two of the petitioners, to wit: A. L. Daly

and J. L. Howard, were charged and under indictment in that court for carrying concealed weapons, to wit: pistols which each of them attempted to use by assaulting the arresting officers, with intent to kill them; and it appeared to the court that warrants were out in the State of South Carolina against the petitioners, charging them with an offense of criminally conspiring together to cheat and defraud of like nature and character as the offense of which they had been convicted in this State, and that a requisition had been issued by the governor of the State of South Carolina upon the governor of North Carolina for the petitioners and was by him held up, to await the result of the trial in this State and is now held in the hands of the governor of this State.

That it further appeared that a requisition from the governor of the State of Iowa had also been issued to the governor of the State of North Carolina that the body of one of the petitioners herein, J. L. Howard, be held to answer an indictment pending in the said State against him for a like offense of criminally conspiring to defraud in the manner as charged and of which he had been convicted in this State.

That it further appeared to the court that a Mr. Wheeler, the prosecuting witness in the case from South Carolina had been to Greensboro and visited the jail in which the petitioners were confined and recognized and identified the said J. L. Howard and H. D. Hawley as the parties who had perpetrated the gold-brick scheme upon him and had fraudulently secured from him the sum of $7000.

That this matter has been expressly passed upon by the supreme court of North Carolina and has been decided adversely to the petitioners and is not a matter as respondent avers that arises under the Federal Constitution, but only in the administration of the criminal laws of the State of North Carolina.

Wherefore the respondent prays the court that the petitioners, J. L. Howard, alias Frank Thompson, A. L. Daly, alias Gonez Bono and H. D. Hawley be recommitted to the custody of the respondent as warden of the State's prison of North Carolina, to be held by him in accordance with the judgment of the superior court of Guilford county, N. C., and of the supreme court of North Carolina, and that the respondent do recover of the petitioners his costs and expenses in this behalf expended.

And further your respondent will ever pray.

THOMAS B. WOMACK,
A. L. BROOKS,
Attorney for Respondent.

NORTH CAROLINA, }
Wake County. }

J. M. Fleming being sworn deposes and says that the foregoing return and answer is true to his own knowledge except as to those matters stated on information and belief and that as to those he believes it to be true.

JAS. M. FLEMING, *Warden.*

Subscribed and sworn to before me Dec. 23, 1901.

R. R. BOYD,

[NOTARIAL SEAL.] *Notary Public.*

21 N. C. Supreme Court, August Term, 1901. #289. Guilford.

The Gold Brick Case.

Bynum & Bynum, F. P. Blair and L. A. Gilmore for appellants; Attorney General Gilmer for the State.

CLARK, *J.:*

The defendants, J. L. Howard, alias Thompson, Gonez Bono, alias A. L. Daley and H. D. Hawley, *and* indicted for a conspiracy to defraud. The indictment was in three counts. At the close of the evidence for the State, the defendants moved the court to require an election by the State upon which count it would rely for conviction. Thereupon the solicitor elected to rely upon the first count, and entered a "nolle prosequi as to the second and third counts—these other counts to be referred to as furnishing particulars." Upon this being done, the defendants asked the court to instruct the jury to return a verdict of not guilty, and excepted to the refusal. The defendants introduced no evidence.

The three counts were simply a description of the same transaction in different ways, and the joinder was unobjectionable. The court need not therefore have required an election. State *vs.* Barber, 113 N. C. at p. 714, citing State *vs.* Morrison, 85 N. C., 561; State *vs.* Allen, 107 N. C., 805; State *vs.* Harris, 106 N. C., 682; State *vs.* Parrish, 104 N. C., 679; State *vs.* Horan, 61 N. C., 571, 576.

The evidence is uncontradicted, and its chief features will be set out by the reporter in the statement of the case. It is almost dramatic in its details, and presents with striking clearness the methods of a fashion of swindling, which has doubtless been little practiced in this State. The indictment in full will also be copied by the reporter.

The first exception is that the indictment did not set out the means by which the conspiracy was to be executed. The point is expressly decided in State *vs.* Brady, 107 N. C. 822, where it is held, upon our own authorities, that a conspiracy to cheat and defraud need not charge the means to be used. Such was also the common law, as will be seen by reference to the English cases therein cited—also citing Commonwealth *vs.* McKisson, 8 S. & R., (Pa.) 419; 8

22 Greenleaf Ev., sec. 95, and while stating that some States had held differently, this court decided to abide by our own and the English rule. The learned counsel from Illinois, who ably argued this exception for the defendants, admitted this but at great length endeavor-*der* to persuade — to overrule our own decisions, contending that the weight of authority in this country was to the contrary. We think not, but if it were, that alone would not be sufficient to induce us to change, unless injustice was shown to follow from our decisions. In fact, however, the weight of authority in other States

seems to uphold our ruling. Among many cases to like effect are State *vs.* Noyes, 25 Vt. 415, State *vs.* Barlett, 30 No. — State *vs.* Crowley, 41 Wis. 271; Thomas *vs.* People, 115 Ill. 351; State *vs.* Stewart, 59 Vt. 273; State *vs.* Grant, 86 Iowa 216; People *vs.* Clark, 10 Mich. 310; 2 Bish. New Crim. Proc. sec. 207 (2).

The Code of Civil Procedure sec. 259 provides: "The court may in all cases order a bill of particulars of the claim of either party to be furnished." This transferred to civil cases what was already the practice in criminal actions. In this case these particulars were fully furnished by the second and third counts, which were only nol-prossed at the instance of the defendants and after the close of the evidence, so that they were in full possession of all the information which a bill of particulars could have furnished them.

The next exception was for refusal of the motion to quash: "For that the allegations in the said bill of indictment, and in each and every count thereof, do not constitute a crime under the ordinance of conspirators, made and accorded by King Edward the First and his council in the thirty-third year of his reign, A. D. 1305, nor by any statutes in England since that date, nor under any common law in force in the State of North Carolina at the date of the said alleged offense."

With reference to the statute 33 Edward, *de conspiratoribus*, Judge Council charged the jury as follows:

"Its existence can be traced back centuries prior to our Independence, and such eminent ancient law-writers as Coke, Hawkins and others, refer in their works to the existence of this crime prior to the passage of the statute 33 Edward 1 *de conspiratoribus*, which statute has been commented upon by counsel for the defendants. Law-
23 writers upon the subject of conspiracy generally agree that the statute referred to was only declaratory of the common law to the extent of the crimes enumerated in the act, leaving the common law as applicable to all other forms of conspiracy known to the law."

The cases sustaining his honor's view of the law of conspiracy are numerous. Among them

State *vs.* Buchanan, 5 Harris and Johnson (Maryland), page 317, is an elaborate discussion of the question, covering fifty pages, and many authorities are cited. In this case, at page 333, the court says: "Much reliance is placed on the statute of Edward 1st *de conspir-torabus* on the supposition that the offense of conspiracy was originally created by that statute." The learned judge then proceeds to show, pages 333–351, that the offense of conspiracy existed prior to the passage of 33 Edward passed in 1304, and on page 351 observes; "By a course of decisions running through a space of more than four hundred years from the reign of Edward 1 to the 59th of George III without a single conflicting adjudication, these points are clearly settled:

"1st. That the offense of conspiracy is of common-law origin, and not restricted or abridged by the statute 33 Edward 1.

"2d. That a conspiracy to do any act that is criminal *per se*, is

an indictable offense at common law, for which it can scarcely be necessary to offer any authority."

In State *v.* Burnham, 15 New Hamp., 396, Gilchrist, J., speaking for the court, says: "In the first place we have no doubt that conspiracy is an indictable offense in this State. It is punishable at common law, its punishment is most repugnant to our institutions, and it is an offense productive of much injury, and as deserving reprehension under one form of government as another."

To the same effect are Commonwealth *v.* Hunt, 45 Mass. 111. State *v.* Pulle, 12 Minn., 164.

In the last case the defendants were indicted for a conspiracy to assault one James H. Murray, to daub and put upon his naked body a great quantity of tar and feathers, and the point was made "that there is no statute in this State creating or defining the crime of conspiracy, nor is any punishment affixed by law to any such offiense, and therefore this court had no jurisdiction thereof. The supreme court held on appeal that conspiracy not declared a crime by the statute law was punishable because of the common law."

In United States *v.* McCord, 72 Fed. Rep., 159, it is said: "The statutes of the United States do not define what a conspiracy is, or create any new offence. They merely recognize the crime of conspiracy as known to the common law and the courts must go to the common law to determine what it is."

In 2 Bishop's New Criminal Law, section 174, the statute of 33 Edward 1 is quoted in full, and the author adds, in subsec. 2, the following:

"Since this statute contains no negative word, a principle explained in another connection shows that it abrogates nothing of the prior common law, but leaves indictable whatever of conspiracy was so before."

In State *vs.* Younger, 12 N. C. 357, this court held that "a combination of two or more to do any unlawful act, or *one prejudicial to another*, is indictable at common law as a conspiracy." State *vs.* Brady, 107 N. C. 822; State *vs.* Powell, 121 N. C. 635; State *vs.* Wilson, 121 N. C. 650.

The cases already cited dispose of the other exceptions for refusal to quash. Some of the authorities cited by defendants are no longer authorities, since the Code of 1888 added to section 1025 the second *proviso* thereof, that in indictments for false pretence "it shall be sufficient in any indictment for obtaining or *attempting to obtain* any such property by false pretences, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act with intent to defraud."

The third exception is as follows: "While the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury

was being selected and empaneled and during the trial of
25 said cause. The solicitor objecting said that the witness Paul Garrett would be the first witness examined, and the others would testify as to matters not in his knowledge, except the detection in Greensboro. Whereupon the court remarked that it was a matter of discretion with the court and that all the witnesses, except the complaining witness Gar-ett and the high sheriff of the county, might be excluded from the court; but as to these witnesses, their high character as citizens forbade the idea that either of them would be influenced by the testimony of the other." It would indeed be sufficient to say that it does not appear that any one of the jurors, who actually sat on the trial, heard the remark; but we prefer to put our ruling upon broader ground. By the common law, judges were not prohibited from expressing an opinion upon the facts, and this is still true of the Federal courts and all the States in which there is no statute making a change in this respect. In North Carolina, the only change is that made by the act of 1796, now code section 413, which reads as follows: "No judge *in giving a charge to the petit jury*, either in a civil or a criminal action, shall give an opinion whether a *fact is fully or sufficiently proven*." This is the extent of the statutory change. It goes no further. In State *vs.* Angel, 29 N. C. 27, Ruffin, C. J. says; "The 'facts' on which the act (1796) restrains him (the judge) from expressing an opinion to the jury are those respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendants depends." In State *vs.* Laxton, 78 N. C. 564, Smith, C. J. says; "It is quite obvious from the words of the act that its special object was to prevent the intimation of such opinion *in connection with and constituting a part of the instructions* by which the jury were to be governed, and when its influence on their minds would be direct and effective." To same purport in De Berry *vs.* Railroad, 100 N. *N.* 310; State *vs.* Robertson, 86 N. C. 628; State *vs.* Jones, 67 N. C. 285. These were cases in which the remarks were made by the judge during the progress of the trial, but it is not necessary that we pass upon the question whether the remark here made by the judge would be ground for setting aside the verdict if made during the progress of the trial, for it was not
26 made at such time. At the time when made, no juror had been selected, and the remark was not "to the jury," nor did it contain any opinion that "a fact was fully or sufficiently proven." No fact had been shown in evidence. The remark was not prohibited at common law and is certainly not prohibited by any terms in the statute. No decision of our court has ever hinted that a statute forbidding the judge "in a charge to the petit jury" from "expressing an opinion whether a fact is fully or sufficiently proven," extended to the remarks of a judge complimentary to one (who was afterwards examined as a witness) made before the jury was selected or empaneled. In every case where such proposition has been presented, this court has denied the application of the statute. State *vs.* Jacobs, 106 N. C. 695; S. C. 107 N. C. 774; State *vs.* Jackson, 113 N. C. 853.

The defendants except to the sentence imposed of imprisonment in the penitentiary but concede that this court has ruled otherwise in State *v.* Mallet 125 N. C. 718 which we reaffirm.

The other exceptions were without merit and were not seriously pressed in this court.

Affirmed.

27 STATE *vs.* HOWARD. # 289. Guilford.

FURCHES, *C. J.*, dissenting:

Without affirming all that is said by my brother Douglas in the elaborate and learned discussion in his dissenting opinion, I cannot say that I am satisfied that the defendants have had a fair trial. In my opinion there is error, at least, in what the judge said as to Garrett's high character on the motion to separate the witnesses and in what he said near the close of his charge to the jury, that Gar-ett's conduct was not a proper subject for unfriendly comment.

MONTGOMERY, J. concurs in the conclusion reached by the court. He thinks, however, that what his honor said on the trial below in declaring that two of the State's witnesses were of so high a personal character as that he would not ask them to leave the court-room, on a motion for the separation of the witnesses, and also what he said in his instructions to the jury in defending one of the same witnesses against the adverse criticisms of the defendant's counsel on the witness'es testimony was inappropriate and indiscreet. The language of the statute on the subject may not have been violated but its spirit certainly was.

28 To the keeper of the common jail of Guilford county:

You are hereby commanded to receive the bodies of A. L. Daley, alias Gonez Bono, J. L. Howard alias Frank Thompson, and H. D. Hawley, who are held to bail in the sum of three thousand dollars each for their appearance at the next term of the superior court of Guilford county.

This 23rd day of March 1901.

(Signed) J. M. WOLFE, *J. P.*

NORTH CAROLINA, *Guilford County.*

I. J. F. Jordan, sheriff of Guilford county, N. C., do hereby certify that there foregoing is an exact and true copy of the mittimus issued by J. M. Wolfe, J. P., to me in said case, and now on file in my office, by authority of which the parties therein named were by me held and produced in the superior court at the June term 1901 thereof, at which term the said defendants where convicted and sentenced.

J. F. JORDAN, *Sheriff.*

Sworn to and subscribed before me this the 20th day of December 1901.

JNO. J. NELSON,
C. S. C. of Guilford County.

[OFFICIAL SEAL.]

29 STATE OF NORTH CAROLINA:

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Guilford County, Gilmer Township. Before A. P. Eckel, J. P.

H. A. Mimms, being first duly sworn, complains and says, that at and in said county and in Gilmer township on or about the 22nd day of March, A. D. 1901, one A. L. Daley, alias Gonez Bono, L. J. Howard, alias Frank Thompson and H. D. Hawley, late of the county of Guilford, being persons of evil minds and dispositions, and seeking to get their living by various subtile, fraudulent and dishonest practices, on the 22nd day of March, 1901, and on divers other days prior thereto in secrecy with deceit and intent to defraud, with force and arms at and in the county aforesaid, among themselves together with divers other evil-disposed persons, unlawfully, fraudulently, feloniously and deceitfully did combine, conspire, confederate and agree together by divers false pretenses and subtile means and devices to obtain from one Paul Garrett divers large sums of money of the said Paul Garrett and to cheat and defraud him by means of said false pretenses and subtile deceits, and against the peace and dignity of the State.

Second count. Affiant further says that A. L. Daley, alias Gonez Bono, J. L. Howard, alias Frank Thompson and H. D. Hawley, late of the county of Guilford, being persons of fraudulent minds and dispositions, and wickedly devising and intending to cheat and defraud the said Paul Garrett of his moneys, goods, chattels and property, did on the 22nd day of March, A. D. 1901, in the county of Guilford aforesaid, feloniously, wickedly and deceitfully combine, conspire, confederate and agree together to cheat and defraud the said Paul Garrett of h*id* moneys, goods chattels and property as
30 aforesaid, in the false and deceitful color and pretenses of the said J. L. Howard, alias Frank Thompson, to wit, by his *and* the said Frank Thompson and his associate and confederate, Gonez Bono, alias A. L. Daley, — were then and there the owners of and in possession of large blocks of gold as well as the owners of large and valuable mining interests in Arizona and in pursuance and according to said conspiracy, did on the said date in the county of Guilford, wickedly, fraudulently and falsely exhibit and show to the said Paul Garrett large blocks of metal in possession and control of said Gonez Bono, alias A. L. Daley, one of the co-conspirators of the said L. J. Howard, alias Frank Thompson, pretending *that* the said blocks of metal then and there to be solid blocks of gold, 22 karats fine and of the value of many thousands of dollars which they rep-

resented that they would then and there demonstrate by a chemical analysis to be then and there made by said co-conspirator, H. D. Hawley, who was then and there aiding and abetting his co-conspirators in their execution of their common, fraudulent and felonious designs to cheat and defraud all in pursuance of a common conspiracy and confederation had and made by and between the said J. L. Howard, alias Frank Thompson, the said A. L. Daley, alias Gonez Bono, and the said H. D. Hawley and the said J. L. Howard, alias Frank Thompson then and there sought to dispose of and sell to the said Paul Garrett the said blocks of metal for large sums of money; whereas, in truth and fact the said metal blocks falsely and fraudulently represented to be gold, were not gold, but of a cheap and comparatively worthless metal, by means of which said false and fraudulent and felonious representations the said J. L. Howard alias Frank Thompson, the said A. L. Daley, alias Gonez Bono and the said H. D. Hawley, in pursuance of their unlawful agreement and conspiracy, sought to obtain unlawfully and unjustly large sums of money from the said Paul Garrett.

31 Third count. Affiant says further that the said J. L. Howard, alias Frank Thompson, and the said A. L. Daley, alias Gonez Bono, and the said H. D. Hawley, being persons of evil minds and dispositions and not having the fear of God before their eyes and being moved and seduced by the instigation of the devil, on the 22nd day of March, 1901, did unlawfully, wickedly and feloniously conspire, combine, confederate and agree together in and upon Paul Garrett, in the peace of God and in the State, then and there being feloniously to make an assault, and him, the said Paul Garrett, in bodily fear and danger of his life, then and there feloniously to put and the goods and chattels, moneys and property of the said Paul Garrett from the person and against the will of the said Paul Garrett, then and there feloniously and fraudulently to steal, take and carry away as by the said L. J. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley had been mutually agreed and undertaken to do, to the evil example of all good citizens and ag-*sint* the peace and dignity of the State.

H. A. MIMMS, *Affiant.*

Subscribed and sworn to before me this the 23rd day of March, A. D. 1901.

A. P. ECKEL, *J. P.*

NORTH CAROLINA, }
Guilford County, Gilmer Township. }

State of North Carolina to any constable or other lawful officer of Guilford county, Greeting:

You are forthwith commanded to arrest A. L. Daley, alias Gonez Bono, J. L. Howard, alias Frank Thompson, and H. D. Hawley and them safely keep so that you have them before me at my office

32 in Greensboro, immediately to answer the above complaint and be dealt with as the law directs.

Given under my hand and seal this the 23rd day of March, 1901.

A. P. ECKEL, *J. P.*

The warrants against the defendants above named upon affidavits were transferred to me by A. P. Eckel, J. P. I proceeded to investigate the charges against the said defendants and after hearing the evidence and argument of counsel, I adjudged that there was probable cause of guilt, and held each one, viz: A. L. Daley, Frank Thompson and H. D. Hawley to bail in the sum of $3,000.00 for their appearance at the next term of the superior court for Guilford county, with good and sufficient security. The following witnesses were recognized in the sum of $50.00 each to appear at the next term of Guilford superior court, and not depart till discharged by the solicitor.

Paul Garrett—H. A. Mims—A. C. Patterson—J. F. Jordan—Garland Daniels—Baall Boone—Henry Whitfield—J. A. Weatherly—Marion Cobb—John Thompson.

J. M. WOLFE, *J. P.*

April 20th, 1901.

33 NORTH CAROLINA:

Supreme Court, August Term, 1901, Guilford County.

STATE
vs.
J. L. HOWARD, A. L. DALEY, and H. D. Hawley. } No. 289. Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Guilford county:—upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable Walter Clark justice, be certified to the said superior court, to the intent that the judgment be affirmed. And it is considered and adjudged further, that the defendants do pay the costs of the appeal in this court incurred, to wit, the sum of forty-six $\frac{80}{100}$ dollars ($46.80), and let execution issue therefor.

I, Thomas S. Kenan clerk of said court do hereby certify the above to be a true copy of the opinion and judgment in the above-entitled cause. Dec. 9, 1901

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk of the Supreme Court.

Furnished to Messrs. Gilmore & Blair, at their request.

K.

34 And thereupon to wit: on the 28th day of December, 1901, by leave of court first had the petitioners filed replication and

answer to said return of said respondent in the words and figures following to wit:

35 In the United States Circuit Court for the Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley, Petitioners,
vs.
Capt. J. M. FLEMING, Warden of States Penitentiary of North Carolina.

To the Honorable Melville W. Fuller, Chief Justice, and the associate justices of the Supreme Court of the United States, and to Thomas R. Purnell, judge of the United States circuit court for the eastern district of North Carolina:

Your petitioners for replication to the return of J. M. Fleming, warden of the penitentiary of North Carolina, to the writ of *habeas corpus*, herein for the production before this honorable court of the bodies of your petitioners J. L. Howard, A. L. Daley and H. D. Hawley etc. say:

1. That they and each of them deny that they were arrested on warrant or process whatever issued by A. E. Eckle directed to J. F. Jordan, as sheriff of Guilford county North Carolina, or to any person or officer of said county; and deny that such justice or any other of said county issued such warrant or any warrant for the arrest of your petitioners at the complaint of one Paul Garrett or any one complaining of injury to him by your petitioners.

Your petitioners aver that they were seized without warrant or process and taken before one A. P. Eckle, at Greensboro and upon their motion were removed therefrom to the office of one J. N. Wolfe, a justice of the peace of the county of Guilford and were later taken from thence to the common jail of said county of

36 Guilford without bond allowed until on June 5th they were taken before W. B. Council presiding as judge of the superior court of Guilford county but without cap- or warrant by the said court directing said sheriff so to produce your petitioners.

Your petitioners answering further deny that the said supposed indictment returned into said superior court as and for a true bill against your petitioners was in fact a true bill or legal indictment and for the reason that the said supposed grand jury were not a legal body of grand jurors selected, summoned and empanneled according as the law provides, but that they were so selected summoned and empanneled as set forth in the petition of your petitioners for writ of *habeas corpus* and on file herein and to which reference is here had, and the same made part of this answer as though here again restated. That in the drawing selecting and empanneling of said number of men as a grand jury the State's agents and officers discriminated against and denied your petitioners the just and equal protection of the laws of the State of North Carolina in this that the law of the said State provides that in each county a jury-box shall be

kept with two divisions marked respectively No. 1 and No. 2, and that the county commissioners at stated intervals shall place therein the names of persons residing in said county eligible and qualified for jury duty, and that the juries for each term of court shall be drawn indiscriminately from box No. 1 and after service upon the jury at the term of court for which they were drawn the names of said persons shall be placed in box No. 2. That the jurors drawn for service at the term of court aforesaid by said county commissioners were not drawn indiscriminately from box No. 1 but were selected by the said commissioners from township boxes which the said commissioners had theretofore prepared, and that there was no general mixing of the names of all the persons eligible for jury duty, or was there any mixing at all of said names, but that said commissioners drew from certain township boxes certain names of persons who appeared before said court as grand and petit jurors; and whose incompetency and unfitness under the law for such service and duty as aforesaid are & were presumed to be known to A. L. Brooks, State solicitor of said county and district,
37 and to W. B. Council the judge presiding in and over said court, and to J. F. Jordan, sheriff of said Guilford county, all of whom were the agents and officers of the State of North Carolina and charged under their several oaths with the due and just administration of the laws of the State, and that each and every of said State's agents and officers in their several positions of duty as aforesaid by their conduct as aforesaid denied your petitioners the due and equal protection of the laws of the State of North Carolina in the respects aforesaid and that said pretended indictment by said pretended grand jury in said court was on that account a nullity and void. Your petitioners further answering say that upon the filing in said court of said indictment no process of any sort or kind issued by said court whereby to bring before it your petitioners to answer said indictment, but that your petitioners without process, or warrant were brought before said court and there informed of the contents of said supposed indictment, and that thereupon your petitioners filed a motion in writing to quash said indictment because the same was void in law, was not due process of law, did not charge any offense known to the law of said State, common, statutory or other, or sufficiently to inform and advise your petitioners as to what was intended to be charged against them, and otherwise insufficient and void as by their said written motion fully set forth in the printed record made part of respondent's return and which printed record is true and correct in every particular and to which reference is here made for a more full and particular account of your petitioners' said motion to quash said indictment and trial so had and for every other purpose pertinent to this investigation, but which their said motion the court overruled and denied, and thereby again as the agent and representative of the State of North Carolina did the said judge of said court deny your petitioners the due and equal and just protection of the laws of the State of North Carolina as guaranteed to them by the constitution of the State of North

Carolina and by the fourteenth amendment of the Constitution of the United States.

Your petitioners further aver that thereupon they moved
38 for a bill of particulars for the 1st, 2nd and 3rd counts of said indictment, setting forth in their said motion that said 1st count did not charge an offense under the law or set forth such facts and circumstances as to advise your petitioners what it was that was intended to be charged against them, or sufficient averment to apprise them of the nature and cause of the accusation against them or to enable them to prepare their defense thereto or to plead former conviction or acquittal or jeopardy thereunder to a second charge or indictment for the said same supposed offense, but which said motion the said court denied and therein and thereby your petitioners were by the agents and representatives of said State, charged with the administration of its laws, were denied the due and equal protection of the laws of said State under the constitution of said State and said fourteenth amendment.

Your petitioners further unswering say that thereupon they by and through their counsel entered their plea of not guiity to said indictment and each count thereof and that said court and said solicitor and said sheriff empanneled a number of men drawn and selected in the manner hereinabove set forth and contrary to the law of North Carolina as petit jurors, and therein and thereby the said court solicitor and sheriff as the agents and officers of the State of North Carolina charged with the enforcement of its laws denied to your petitioner the due and equal protection of the laws of said State in so empanneling said petit jury and forcing them to the jeopardy of their liberty before such illegal body.

Your petitioners further aver that the said supposed complaint, indictment or charge against your petitioners had to do with a certain contract between your petitioner J. L. Howard and A. L. Daley and one Paul Garrett, which contract in substance was that your said petitioners would pay said Paul Garrett $25.00 a day and his expenses to attend to certain affairs for them, and a third interest in what they had for his services to be rendered in that behalf; and that they had not proposed or in their minds purposed the obtaining from said Garrett any money or property whatever or to
39 accept from him any service except upon due compensation therefor; and yet such facts being before said court and said supposed petit jury adduced without more — said court upon the motion of your petitioners refused to discharge them from the complaint aforesaid, but in a written charge to said jury in substance told them that your petitioners were guilty of the charge made against them, denied them the law's presumption of innocence and commended the witness Garrett and his conduct to said jury and asserted that if your petitioners felt themselves aggrieved at said court's charge *charge* them they could appeal to the supreme court of the State of North Carolina, all which acts and doings by said judge of said court being so, the agent and officer of said State of North Carolina charged with the due administration of its laws, therein and thereby denied to your petitioners the due and equal

protection of the laws of said State, and therein and thereby wrongfully caused, precipitated and brought about the verdict of guilty against your petitioners by said jury. Your petitioners thereupon by their counsel filed their motion for a new trial and to have said verdict of said jury set aside, but which said motion said court denied.

Thereupon your petitioners by their counsel moved in arrest of judgment upon said verdict in said court but which said motion said court denied, and thereupon said court entered judgment upon said verdict of said jury in said cause in words *of the* following:

Judgment of the court that the defendant J. L. Howard, alias Frank Thomson, be imprisoned in the State penitentiary for a term of ten years: judgment of the court that the defendant H. D. Hawley be imprisoned in the State penitentiary for a term of ten years: judgment of the court that A. L. Daley, alias *B*onez Bono, be imprisoned in the State penitentiary for the term of seven years. And which said judgment so entered was void and of no effect because in direct violation of the statute of the State of North Carolina as appears in the acts of the legislature of 1887, chap. 355, entitled "An act to provide for the working of certain convicts upon public roads of the State:"

SEC. 1. That when any county has made provision for the working of convicts upon the public roads, or when *victs upon the public roads, or when* any number of counties have jointly made provision for working convicts upon the public roads, it shall be lawful for, and the duty of the judge holding court in such counties, to sentence to imprisonment and hard labor on the public roads for such terms as are now prescribed by law for their imprisonment in the county jails or in the State prison, the following classes of convicts: first, all persons convicted of offences the punishment whereof would otherwise be wholly, or in part, imprisonment in the common jail; second, all persons convicted of crimes the punishment whereof would otherwise sholly or in part be imprisonment in the penitentiary for a term not exceeding ten years."

Unless as provided in section 4 of the said act "That in all cases where the judge presiding shall be satisfied that there is good reason to fear that an attempt to release or to injure any person convicted of any of the offences mentioned in section one of this act, class second, it shall be lawful for the judge to sentence such convicts to imprisonment in the penitentiary, as is now provided by law: *Provided* That no person who has been convicted and sentenced on a charge of murder, manslaughter, rape, or attempt to commit rape, or arson, shall be assigned under this act: *Provided*, That this act shall not apply to the counties of Jackson, Swain, Macon, *E*herokee, Clay and Graham," said county of Guilford having adopted said road act Sept. 18", 1894. The conditions of said section four not having been so found by said court and made part of its judgment in said cause do not relieve the judgment and sentence so inflicted as aforesaid, and that the same not being so found said court had no jurisdiction or power or authority to enter said judgment or inflict or impose

said sentence in said State's prison against your petitioners, and that the same is therefore wholly void and of no effect.

Your petitioners further answering aver that the June term 1901 of said Guilford county superior court opened on the 4th day of said month of June and terminated on the 11th day of said month of June, and that your petitioners prayed and *was* allowed an appeal to the supreme court of said State, and that the said actings
41 and doings against them in said superior court were duly made record of, protested against, presented and certified to said supreme court at the August term thereof 1901, and wherein your petitioners prayed and sought relief against the wrongs inflicted, discriminations made, and the equal protection of the laws of the State of North Carolina, denied to your petitioners, and that they so prayed without avail in said supreme court, and that by its judgment the acts and doings of said Guilford county superior court and the judgment entered therein were by said supreme court affirmed and that thereby your petitioners were discriminated against, denied the equal and just protection of the laws of the State of North Carolina as guaranteed to them by the constitution of said State and by the 13th and 14th amendments to the Constitution of the United States, and therein and thereby your petitioners were grievously wronged and injured.

Your petitioners further answering aver that it is true that the so-called true bill or indictment returned in said Guilford superior court contained three counts: First of which a charge of conspiracy to cheat and defraud without more; second a conspiracy to rob by force, and intimidation, third to conspire to cheat and defraud without more. That to said indictment so returned your petitioners in apt time moved the court for a bill of particulars on each count of said indictment, and which said motion was by the court denied and thereupon moved to quash the same on grounds aforesaid which motion was denied. That at the close of the State's evidence the State solicitor *nolli pros-* the second and third counts, thereby striking them as completely out of the record as though never in it, and relied for judgment on the said first count.

Your petitioners aver that each count in an indictment must be sufficient in its averment to constitute a distinct charge of crime, and so full and plain as to apprise the accused of the nature and cause of the accusation against him and to enable him to prepare and make his defence thereto, and sufficient to be a bar to a
42 second prosecution for the same offense; and that said first count of said indictment was not so sufficient, did not charge an offense known to the law, statutory or other, of the State of North Carolina, and that the same could not be in law aid*d*ed by the said second and third counts in said indictment for any purpose in law and that it was not so aided in said cause, and that therein and thereby your petitioners were denied due process of law and the equal protection of the laws of the State of North Carolina as guaranteed by its constitution and the Constitution of the United States.

Your petitioners further aver that the opinion of the supreme court of said State in said cause in forming said judgment and hold-

ing said first count of said indictment good and sufficient in law, denied your petitioners due process of law and equal protection of the laws as aforesaid, and the truth and fact of which your petitioners aver is clearly and well presented in the dissenting opinion of Mr. Justice Douglas, rendered in said cause in said supreme court, a copy of which is hereto annexed, as part hereof, marked "Exhibit A."

Your petitioners further aver that by the said judgment of said Guilford superior court and its affirmance by said supreme court your petitioners have been denied the rights and privileges guaranteed to them by the constitution of the State of North Carolina and the Constitution of the United States, of the liberty of speech and the making of contract due and lawful in its terms and object, and that in the exercise of their right and privilege under the Constitution and laws aforesaid your petitioners had the right and privilege to meet and confer, converse and contract with said Paul Garrett in the manner, in the way, in the words, on the terms, conditions and consideration as they did, and as they were shown to have done in said record, and that their doings and actings in that behalf were the exercise of a right and privilege guaranteed to them by the constitution of said State of North Carolina and the Constitution of the United States, and that said charge against them and their conviction thereunder as aforesaid was a violation
43 of their said constitutional rights and privileges and abridgement of their privileges as citizens of the United States, they being such citizens, and as citizens of a State other than North Carolina, and as citizens of the State of North Carolina, and that in consequence your petitioners have been discriminated against and denied the equal protection of the laws of said State of North Carolina, by the courts of said State, and that in consequence the judgment of said Guilford superior court and the affirmation thereof by said supreme court is an invasion of the constitutional rights and privileges of your petitioners in the respects aforesaid, and that their privileges and immunities were and are thereby abridged.

Your petitioners further answering aver that the sentence so imposed and inflicted upon them by said Guilford superior court and the affirmance thereof by said supreme court, was cruel and unusual and greater than ever imposed or inflicted by its courts in said State for the like or similar offense, and it was and is and each one of them was and is in *the* violation of the constitution of the State of North Carolina as interpreted by this court and in violation of the eighth amendment of the Constitution of the United States, and in violation of section 4 of the fourteenth amendment of the Constitution of the United States in this that it is a denial by the courts of the State of North Carolina of the du- and equal protection of its laws and is therefore void.

Your petitioners further aver that the said Guilford superior court rendered its judgment as to infliction of penalty against your petitioners under section 1097 of the Criminal Code of North Carolina, which is in the words and figures as follows: viz: "Punishment for misdemeanors not specified. Offences made misdemeanors by

statute, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offence be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment
44 in the county jail or penitentiary, not less than four months nor more than ten years, and be fined."

That the indictment so returned against your petitioners in form and words charges the said supposed offences as a felony and that if said offense be so a felony, section 1096 of the criminal code of North Carolina would limit the maximum extent of punishment that would apply to such a felony, and which section is in the words, viz: "Punishments for felonies not specified. Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute, shall be imprisoned in the county jail or penitentiary not exceeding two years, and be fined, in the discretion of the court, or if the offense be infamous, the person offending shall be imprisoned in the county jail or penitentiary, not less than four months nor more than ten years, and be fined."

Your petitioners further aver that Guilford county in the State of North Carolina, has b- and through a resolution of the commissioners of said county heretefore, to wit, on the 18th day of Sept. 1894, by solemn resolve in executive session adopted the road system provided for in chapt. 365 of the Laws of North Carolina, passed by its legislature in 1887, and that from thence hitherto said county has had and kept in force and the same still is in force in said county for the working of convicts whose term of imprisonment coincides with section one of said chapter. That said adoption by said county commissioners in said county brought said chapter 355 of the Laws of 1887 of North Carolina into force in said county and binding and obligatory on the judge holding terms of the superior court of said State in said county, and was so obligatory on said court and the judge thereof during the trial and at the time of sentencing and entering judgment against your petitioners in said cause, and that said judge of said court in said cause had no jurisdiction or power to enter in said cause any other judgment or order or decree than was provided for in said chapter 355 of the laws of North Carolina passed by its legislature in 1887, and that in
45 consequence the judgment so entered in said cause in said court by the judge thereof as aforesaid was so entered without jurisdiction and was void, and was a discrimination against your petitioners and a denial to them of the equal protection of the laws of said State.

"Your petitioners further aver that the said supreme court of said State of North Carolina had no jurisdiction or power to form said judgment of said Guilford superior court and that their acts in that behalf were without authority or jurisdiction, and that the same was and is void, and so a denial of the equal protection of the laws of said State as aforesaid. * * *

"Your petitioners further aver that said judgment so entered by said Guilford superior court and affirmed by said supreme court is an entirety and that on the 13th day of December 1901 your peti-

tioners were thereunder taken to and imprisoned in the penitentiary of the State of North Carolina at Raleigh where they have ever since been and now are, and that said judgment has been fully put into execution and in part satisfied.

"Your petitioners further aver that the action of said Guilford superior court in entering said judgment against your petitioners was a denial to them and each of them by said court of the equal protection of the laws of the said State of North Carolina and that the affirmance thereof by the supreme court of the State of North Carolina was a further denial to your petitioners and each of them of the equal protection of the laws of said State in violation of the 14th amendment of the Constitution of the United States and the constitution and laws of the State of North Carolina, and that the said imprisonment of your petitioners was and is unlawful and a denial of the equal protection of the laws of said State, and that your petitioners are now confined in said State penitentiary under a void judgment and void execution and void commitment, and that being so wrongfully and unlawfully deprived of their liberty against their will they are entitled to be relieved therefrom.

"Your petitioners further aver that it is not true that they or either of them at any time ever met a Mr. Wheeler, resident of South Carolina or dealt with any person resident of said State or from said State, or obtained from any such person any sum
46 of money at any time by any means whatever, or that they or either of them was ever in the State of South Carolina.

"Your petitioners further answering aver that they nor either of them cheated or defrauded any man, company or concern either in the State of South Carolina or the State of Iowa, and aver that such prosecution or prosecutions, if any, there be made or laid against them in either of said States, that the same are founded in fraud and perjury and are urged to harass and oppress your petitioners and to prejudice them in their strife for justice in this community and before this honorable court.

"Your petitioners further aver that there is no law, statutory or other in the State of North Carolina known as a 'habitual criminal act' or any law authorizing or justifying or sanctioning the enhancing of punishment of one convicted of crime in said State because of previous convictions against such a convict, and that said judge of said Guilford superior court in taking into account the unsupported rumor of charges in other States against your petitioners and allowing same to enhance the punishment imposed and inflicted in the particular case as was done against your petitioners as in the return of respondent herein set forth was a denial to your petitioners by said court of the due and equal protection of the laws of the State of North Carolina in violation of the constitution of said State and said fourteenth amendment; and that the judgment of said court so rendered abridged the rights, immunities and privileges of your petitioners & was and is unlawful cruel & barbarous,

"Your petitioners further aver that because said judgment so imposed and rendered against them has been put into full execution and a part thereof been suffered and satisfied, that they could not

prosecute a writ of error to the United States Supreme Court with supercedeas and obtain their liberty upon terms of bail pending a hearing and consideration thereof and that they are wholly without means to bear the expense of such writ. That they have been
47 confined in jail and State's prison since the 23rd day of March 1901, and that the expense attendant upon the defence made by them in said Guilford superior court and S-ate supreme court impoverished them and their said friends to such an extent that they are whol-y without resources to make or prosecute a writ of error to the Supreme Court of the United States or to avail themselves of a right other than this writ of *habeas corpus*.

Your petitioners further aver that the copy of the judgment annexed to and made part of their petition herein and as referred to by respondents in his return and answer herein is a true and correct copy of the judgment rendered and entered in said cause against them; and that the printed record referred to and certified copy of the record hereto annexed and made part of respondent's return herein is a true and correct transcription of the record of the proceedings had in said cause against your petitioners in said Guilford superior court and that as appears therein and thereby the said proceedings were had and conducted against your petitioners, in their absence from said court during the progress and trial as there reported; and that said Guilford superior court as appears by said record denied your petitioners and each of them their constitutional right and privilege of being present in court to hear and take part in every step in the progress and hearing of the said felony charged against them; but all which your petitioners aver said record does not show was the fact, done or performed by said court and in this that they were denied the just and equal protection of the
48 laws of said State by the courts thereof and that the same was not due process of law under the 14th amendment of the Constitution of the United States.

"Your petitioners further aver that the said judgment of the said court so entered, copy of which is annexed to and made part of your petitioners' petition herein and admitted as correct by the return and answer to the writ of *habeas corpus* herein by Capt. J. M. Fleming, respondent, thereto is insufficient in form and substance to show and does not recite facts sufficient in law to show that due process of law was observed or had in the rendition thereof against your petitioners; and your petitioners aver that the same is not in form and substance a sufficient warrant or justification on which to commit, retain or continue your petitioners in custody in the penitentiary of the State of North Carolina at Raleigh; and their presence and holding there is against their will, and is illegal and void; and a discrimination against and denial to them of due process of law and the equal protection of the laws of the State of North Carolina as the same are usually, regularly and customarily administered in said State against the citizens thereof; and is in violation of their rights and privileges as guaranteed to them under the 13th & 14th amendment- of the Constitution of the United States.

"Your petitioners further aver that this honorable court has the

jurisdiction to grant the writ of *habeas corpus* to inquire into the cause of the restraint of liberty under sections # 751 to # 766 both inclusive of the Revised Statutes of the United States and thereunder to do unto justice what the law commands; and to relieve and discharge your petitioners from their present unlawful detention and restraint against their several wills; and for and on account of the several grounds hereinbefore in their said petition alleged and in this their replication to the return of respondent herein etc.

"Your petitioners further answering deny each and every
49 other matter or fact and the sufficiency thereof in said re*spondent's return* and answer herein; not herein specifically answered or denied and hereby or herein admitted as true.

Wherefore your petitioners pray to be discharged from the custody and detention of them by the said Capt. J. M. Fleming warden of the penitentiary of the State of North Carolina and for such other and further relief as to justice may seem meet."

J. L. HOWARD,
H. D. HAWLEY,
A. L. DALY,
Petitioners.

L. A. GILMORE,
W. P. BYNUM, JR.,
Attorneys for Petitioners.

Circuit Court of the United States, Eastern District of North Carolina, at Raleigh.

J. L. Howard alias Frank Thompson; A. L. Daley, alias Gonez Bono and H. D. Hawley being first duly sworn deposes and says that the above and foregoing — replication and answer by them subscribed to the return of the respondent Capt. J. M. Fleming to the writ of *habeas corpus* issued herein; they have read and know the contents thereof and that the same is true as they verily believe.

J. L. HOWARD.
H. D. HAWLEY.
A. L. DALY.

Subscribed and sworn to before me this 28 day of December 1901.
N. J. RIDDICK, *Clerk.*

50 STATE OF NORTH CAROLINA, }
Guilford County. }

Be it remembered that at a regular term of the superior court begun and held for the county of Guilford at the court-house in Greensboro on the 3rd day of June 1901 Honorable W. B. Councill, judge presiding, the following proceedings *was* had:

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Indictmen.	Conspiracy.

Motion by defendants to separate witnesses and court states that he would not exclude from court-room the high sheriff of the county nor his deputy nor the principal witness for the prosecution; and the court further states that this is a matter discretionary with the court and considering the high moral character of the witnesses above mentioned declines the motion. Defendants except to the remarks of the court. The remarks of the court were made before jury was passed upon by either State or defendants.

In this case the following jury — sworn and empannelled. Frank Barber, B. B. Myers, G. M. Rumley, J. Q. Curtis, W. S. Holt, J. W. Busick, A. M. Farrington, D. M. Glass, S. H. Coltrane, C. H. Fields, W. A. Heath, G. K. Briggs.

J. R. Robinson sworn as officer of the jury, pending trial. Court takes a recess until 9.30 o'clock tomorrow morning.

Saturday morning June 8th 1901 court meets at 9.30 o'clock and the following proceedings — had:

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Indictment.	Conspiracy.

51 Trial resumed, pending trial court takes a recess until 9.30 o'clock Monday morning.

Monday morning June the 10th 1901 court meets at 9.30 o'clock and the following proceedings are had.

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Indictment.	Conspiracy.

Trial concluded and the jury for their verdict say—defendants guilty.

Tuesday morning June the 11th 1901 court meets at 9.30 o'clock a. m. and the following proceedings — had.

STATE *vs.* J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley.	Indictment.	Conspiracy.

Defendants are again brought into court, motion by defendants to set aside verdict—motion denied—motion by defendants for new trial—motion overruled—motion in arrest of judgment—motion

denied—motion of solicitor for judgment—judgment of the court that the defendant J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that the defendant H. D. Hawley be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that the defendant A. L. Daley, alias Gonez Bono, be imprisoned in the State penitentiary for the term of seven years.

Defendants except to the sentence as pronounced by the court and appeal to the supreme court. Notice of appeal waived in open court.

Appeal bond fixed at the sum of fifty dollars or otherwise allowed to appeal as the law allows.

52 By consent defendants allowed fifty days to serve case on appeal and State allowed thirty days thereafter to accept case on appeal or file counter-case.

Bail bond for defendant J. L. Howard, alias Frank Thompson fixed by the court at the sum of five thousand dollars.

Bail bond for the defendant H. D. Hawley fixed by the court at the sum of five thousand dollars.

Bail bond for the defendant A. L. Daley alias Gobez Bono fixed by the court at the sum of three thousand dollars.

STATE OF NORTH CAROLINA, *Guilford County,* } ss:

I John J. Nelson, clerk of the superior court of said county do hereby certify that the foregoing is a true and correct copy of the trial and judgments in the case State *vs.* J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. D. Hawley as same appears upon record in my office.

Witness my hand and official seal this the 26th day of December 1901.

JOHN J. NELSON,
[SEAL.] *Clerk of Superior Court.*

53 STATE
v.
HOWARD ET AL.

MONTGOMERY, *J.* concurs in the conclusion reached by the court. He thinks however that what his honor said on the trial below in declaring that two of the State's witnesses were of so high a personal character as that he would not ask them to leave the court-room, on a motion for the separation of the witnesses, and also what he said in his instructions to the jury in defending one of the same witnesses against the adverse criticisms of the defendant's counsel on the witness' testimony was inappropriate and indiscreet. The language of the statute on the subject may not have been violated, but its spirit certainly was.

54 EX. "A."

STATE *vs.* HOWARD. } #289. Guilford.

DOUGLAS, *J., dissenting:*

In dissenting from the opinion of the court, which I am constrained to do upon the highest considerations of private right and public policy, I feel much diffidence in expressing my own opinions as they are so totally different from those of the court. However, they are the result of my deliberate judgment, and as such must find expression, as I cannot even silently concur in a decision which to me seems so dangerous in its tendencies and so devoid of legal basis in its conclusions.

I have no sympathy whatever for a gold-brick swindler, and but little for his victim, who is usually caught in the trap he thinks he has set for another. The ordinary business man has no earthly use for gold, except for what it will bring in the market, and no object in buying it unless he can resell at a higher price. Therefore he always expects to get it for less than its value from a supposed owner who must be ignorant of its value. He knows, or should know, that gold is current the world over, and that any one having it can carry or send it to the nearest mint and obtain its full value in current coin. Usually the pretended miner professes to be very ignorant, or has a partner who is even more ignorant than himself, and whose interest may be *bought out* at a small sum.

In the case at bar the inducements offered Garrett appear to have been $25 per day and his expenses, together with a "one-third interest in everything he had," including $36,000 in gold at Greensboro, $48,000 in gold in Arizona, and a gold mine capable of producing one million dollars a year. In consideration for such great wealth, Garrett was to give *his services only;* and yet in his suit for a total breach of this contract, he places his damages at the modest sum of $2,000. (Printed Record pp. 15, 41, 47, 48.) Again he says on page 42: "It was mighty pretty, and I thought possibly there might be something in it. I may have been something of a phantom-chaser in this transaction." It would seem so.

There is nothing in this case that appeals to my sympathies, and hence I am free to view it in its legal aspect. I believe that the defendants are all guilty, but this will not induce me to deny to
55 them a single one of the rights which the law gives to them for their protection. I do not believe that the sole purpose of the law is to punish the guilty. A higher object still is the protection of the innocent; but whether innocent or guilty, every citizen is entitled to a fair trial and the equal protection of the laws. As was said by this court in State *vs.* Keith, 63 N. C. 144: "These great principles are inseparable from American government and follow the American flag. No political assemblage under American law, however it may be summoned, or by whatever name it may be called, can rightfully violate them, nor can any court sitting on

American soil sanction their violation." This case finds it counterpart in the great case *Ex parte* Milligan, 4 Wall. 2, great in the court that decided it, great in the counsel who argued it, great in the ability of its opinions and greater still in the principle it settled. Milligan was, before the close of the war, tried and convicted by a court-martial of conspiracy, followed by overt acts, to seize the Federal arsenals and set free and arm the Confederate prisoners. It was held by a unanimous court that he was entitled to a trial by jury according to the law of the land.

The opinion of the court uses the following language on page 18: "Had this tribunal the *legal* power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and, if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people."

In this spirit I approach the case at bar. The defendants may be guilty and deserve their sentence, but to deny them a fair trial would be a wrong, not to them alone, but greater still to the
56 integrity of the law in the preservation of which every citizen has the supremest interest.

To begin with, I am opposed to any further extension of the doctrine of conspiracies, which in this State has been already carried far beyond the danger line. The court seems to rely principally upon the cases of State *vs.* Buchanan, 5 H. & J. (Md.) 317; State *vs.* Brady, 107 N. C. 822, and State *vs.* Younger, 12 N. C. 357. Buchanan's case is regarded as one of the leading cases, and will probably continue to be so regarded as long as judges, impressed with its apparent learning, take for granted its citation. But I am free to say that the argument of the learned counsel for the defendants has convinced me that that case is not only inherently vicious upon its face, but is founded upon a large array of miscitations and embellished with a vast amount of misinformation. For instance, that case holds "that an indictment will lie at common law for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only." What limit is there to such a definition, and what is meant by the word "immoral"? In its widest sense it might mean any act, which in the opinion of the court was contrary to private morality or revealed religion. Can this be the law anywhere? Certainly not in this State unless made so by Brady's case or that at bar. I do not think that Brady's case goes that far in that direction; but on another point it does go beyond any case within my knowledge. Without any citation of authority, and by some process of reasoning incomprehensible to me, it holds that the court

below *properly refused* an instruction that "*though the representations might be false, if the defendants honestly entertained the opinion they were true, they would be not guilty.*" I can only say that such a ruling is in my opinion without foundation in law or justice, and I regret that it should be found in an opinion of this court. It is true the court says that the "court properly refused them in the words asked," but as the words themselves were unobjectionable, and the instruction does not appear to have been given in any words, the qualification of the court merely emphasizes the refusal.

The opinion of the court before us cites Younger's case as holding that "a combination of two or more to do an unlawful act,
57 or *one prejudicial to another*, is indictable at common law as a conspiracy." This is in the syllabus but not in the case. What the *court* said was "that every conspiracy to injure individuals, or to do acts which are unlawful, *or prejudicial to the community* is a conspiracy, and indictable." There is an essential difference between being prejudicial to the *community* and only to an individual. In that case the offence was a conspiracy to cheat by gambling, which was in itself unlawful.

Younger's case is moreover in direct conflict with the opinion of the court as to the antiquity of the present doctrine of conspiracies, as in that case Chief Justice Taylor, perhaps more learned in the ancient common law than any judge who has ever sat upon this bench, says that "conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person, by perjury and a perversion of the law."

But it may be said that the swindle which these parties contemplated was so clearly a crime that some of this discussion has no necessary application. Admitting that to be true, I am now discussing the opinion of the court. If it goes beyond the facts of this case, so must I. If it gives its unqualified approval to the cases of Buchanan and Brady, with all their inherent errors and vast possibilities of danger, then I must express my disapproval in terms equally plain; and if any unguarded words of mine may appear too strong, I know my brethren will ascribe them to their true motive—the strength of my convictions. The opinions of this court are not mere decisions of pending cases. If they were, mere *per curiam* judgments would suffice, at least in cases of affirmation. The real object of the *opinion*, as contradistinguished from the judgment, is to lay down general principles as applied to a certain state of facts for the determination of all future cases of similar nature. The mere character of the defendant does not affect the principle. It is only a gold-brick man today, but who may it be tomorrow? Among the *general principles* resulting from the opinion of the court and the cases it specifically approves are the following: That an indictment for conspiracy will lie at common law, (1) "For a conspiracy to do an act not illegal, nor punishable if done by an individual,
58 but immoral only;" (2) for "a combination of two or more to do any unlawful act, or one prejudicial to another," individual; (3) that "though the representations (relied on to convict)

might be false, if the defendants honestly entertained the opinion they were true, they would be * * * guilty."

From these propositions of law I emphatically dissent. My own views as to the dangers attending the expansion of the doctrine of conspiracies cannot be better expressed than in the following words of Judge Campbell, in delivering the opinion of the court in People *vs.* Barkelow, 37 Mich. 455: "There is no class of cases where defendants are better entitled to the protection of the law against vague charges than where they are charged with conspiracy. The course of legal experience has shown this to have been a familiar resort to catch innocent persons by throwing a drag-net of vague charges, and resorting to suspicions and prejudices to induce juries to convict persons who find it impossible to escape the malicious insinuations of false accusers. Titus Oates' plot has been a warning to all courts and jurists not to encourage any looseness in charges which in exciting times juries and communities are only too ready to catch at to punish those who are unfortunate enough to be suspected." This opinion, concurred in amongst others by Judge Cooley, shows not only the great learning and clear comprehension of the present of those eminent jurists, but also their prophetic grasp of the possibilities of the future. A few years later the English doctrine found its legitimate outcome in Regina *vs.* Parnell, 14 Cox 508, where the great Irish leader with others was indicted for a conspiracy to impoverish owners of land in Ireland by soliciting their tenants not to pay rent. Lord Fitzgerald in summing up the case to the jury said that it was plain and clear that an agreement of two or more persons to commit any wrongful act was an indictable offence. "If," said he, "a tenant withholds his rent, that is a violation of the right of the landlord to receive it; but it would not be a criminal act in the tenant, though it would be in the violation of a right; but if two or more incite him to do that act, their agreement so to incite him is, by the law of the land, an offence." Is
59 not this equivalent to saying that a bare agreement of two persons to break a simple contract, or to induce another one to do so, is a crime? I do not suppose that any one will deny that the indictment of Parnell was purely for political reasons; and if the English rule prevails in this State, what is there to prevent the indictment of the members of our usual labor organizations?

I am further of the opinion that the first count in the indictment, on which alone the defendants were tried, is not sufficient either to put them upon their guard or to furnish the basis for the future defence of former conviction or acquittal. Again, the English rule is invoked, but there a bill of particulars is granted practically as a matter of course. The court in its opinion cites section 259 of the Code to the effect that "the court may in all cases order a bill of particulars of the claim of either party to be furnished." If this section applies to criminal actions, which I doubt, it cannot help this case because the judge *refused* the request. Whatever might have been the effect of a bill of particulars if it had been furnished, surely the refusal of the court to grant it cannot validate an indictment insufficient in itself.

But again the court says that the solicitor for the State need not have elected between the counts, but he *did* elect, and *nol prossed* all but the first count. Those counts are therefore as much out of the indictment as if they had never been in it. But the opinion says that the second and third counts gave the defendants the information they desired. Can it be that a defendant is required to go to a bill of indictment that has been *nol prossed* to find out the meaning of the bill on which he is tried? I am aware of the line of decisions that it is not necessary to set out the particular means by which the cheating was to be accomplished, that is, the indictment need not state each particular act or false pretense upon which the State relied, because this would be impracticable; but it *must set out enough to constitute a crime, and to identify that particular crime with reasonable certainty.* Suppose an indictment were to charge simply that John Smith did in the year 1900 in the county of Wake attempt to steal from William Jones, would any one suppose that
60 Smith could be convicted? Again, suppose that Smith was indicted for attempting to burn a *barn* in the year 1900 and in the county of Wake, could he be tried for attempting to burn any or all of the numerous barns in Wake county that may have been in existence during the year 1900 or any other year within the legal radius thereof? But, forsooth, if Smith is indicted for *conspiracy* to burn some indefinite barn, without burning or attempting to burn any barn whatever, then nothing more need be said. If such is the law, then I am ignorant of the law.

There are several errors, which, for want of time, I must pass over or notice only in the briefest possible manner.

I think the admission in evidence against Hawley of the card bearing his name was fatal error. This card was found in Howard's possession *after* his arrest. There is no evidence that it was ever in Hawley's possession and no suggestion that it is in his handwriting. When shown to him he denied all knowledge of it. It might as well have borne the name of any prominent citizen of Greensboro or State official. Would it then have been evidence against any one? If not, why should it have been evidence against Hawley? The majesty of the law is such that the loftiest are within its reach and the lowliest within its protection.

Passing over other points, I come now to two errors, similar in nature but occurring at different stages of the trial, either one of which is sufficient to entitle the defendants to a new trial, and the combination of which renders it morally impossible that they should have had such a trial as they are entitled to by "the law of the land."

The record shows that after the case had been called for trial and the defendants had pleaded not guilty, and while the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and empaneled and during the trial of said cause. The solicitor objecting, said that the witness Paul Garrett would be the first witness examined and the others would testify as to matters not in his knowledge, except the detection in Greensboro.

Whereupon the court remarked "that it was a matter of discretion with the court, and that all the witnesses except the com-
61 plaining witness, Garrett, and the high sheriff of the county, might be excluded from the court; but as to those witnesses, *their high character as citizens forbade the idea that either of them would be influenced by the testimony of the others!*"

This remarkable statement of fact by his honor was made in the presence of the jury, after the case had been called for trial, and in passing upon a motion in the action. It was not necessary, as he could have refused the motion in his discretion without giving any reason, or he might have given the reason suggested by the solicitor, which would have been harmless His testimony to the high character of Garrett could not have been stronger even if he had been a witness; and can we suppose that the jury would not be influenced by such a statement coming from the judge as to the character of a witness personally unknown to them? Taken in connection with his subsequent charge—and the jury must have connected the two—its practical effect was to withdraw from their consideration the credibility of a witness whose testimony was absolutely essential to the prosecution. The opinion suggests that the jury may not have heard the remark. Such a suggestion comes from the court alone. The evident gist of the exception is that the remarks were made in the presence of the jury and were calculated to influence them. The attorney general in his able brief for the State, says: "It is conceded by the defendants in their third assignment of error, page 111, that 'these remarks of his honor were made before the jury was passed upon by either the State or defendants, but when the regular panel was present in the court-room, *in the jury-box.*'" The italics are mine. He never for a moment suggests that they were beyond the hearing of the court, but proceeds to argue that the defendants' remedy was to "have taken steps looking to the elimination of such jurors as might have been affected by the remarks of his honor."

The opinion refers to the English rule permitting judges to express an opinion upon the facts, but this rule has long ceased to prevail in this country. Even where it still lingers, it is coupled with the obligation upon the judge to instruct the jury that they are not bound by his opinion of the facts. The general rule is thus
62 clearly stated in 11 Enc. Pl. & Prac. 97: "As stated in a preceding section, the practice in most States forbids any expression of opinion as to the weight and sufficiency of the evidence; and the rule as will be subsequently shown, *is most stringently enforced.* Not infrequently judges evinced partisanship in their charges, and moulded verdicts to their will; and juries as frequently shirked responsibility and really adopted the opinion of the judge, finding their verdict as he directed. It was to put a stop to this, and *to secure the constitutional right of trial by a jury* and *not* by a judge, that the various limitations upon this common-law power were imposed by the Constitution or by statutes. The trend of modern action, both legislative and judicial, is to watch over and protect very jealously the legitimate powers of the jury, and to prevent the court from overstepping the line which separates law from

fact. 'Trial judges cannot legally indicate their opinion either expressly or impliedly, *intentionally or otherwise*, as to the credibility of the witnesses, or as to the truth of any fact at issue, and the subject of the evidence.'" In support of this rule five or six hundred cases are cited of which twenty are from this State. The common-law rule was expressly abrogated in this State by the act of 1796, now Code section 413, which reads as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury." From the first this statute has been uniformly given a liberal interpretation in order to carry out its essential principles; but now for the first time this court proposes to overrule the settled policy of a hundred years, and adhere to the exact letter of the law. This necessarily involves overruling numerous decided cases, amongst others those of Reel *vs.* Reel, 9 N. C. 63; State *vs.* Dick, 60 N. C. 45; Wiley *vs.* Gatling, 70 N. C. 410; MacRae *vs.* Lawrence, 75 N. C. 289; Crutchfield *vs.* Railroad, 76 N. C. 320; State *vs.* Dancy, 78 N. C. 437; State *vs.* Jenkins, 85 N. C. 544.

There are numerous other cases enunciating the same principle, but I have cited those only in which a new trial was granted.

63 In all of these cases a new trial was ordered, although none of them came within the letter of the statute, inasmuch as the judge did *not* "give an opinion whether a fact is fully or sufficiently proven." In some of them he was not even addressing the jury, as in Dick's case. In that case this court says, "On the trial a question arose as to the withdrawal of certain confessions of the prisoner. The court declined withdrawing them, but remarked to the solicitor for the State that after the other evidence already given in the cause, he, the solicitor, might withdraw them if he chose to do so, which the solicitor declined. This seems to us an expression of opinion on the part of the judge, that the case was sufficiently proved without the aid of the confessions. This is not directly asserted, but is a matter of inference plainly from the manner in which the expedient of withdrawing the testimony is suggested. * * *" "The object" (of the statute) "is not to inform the jury of their province, but to guard them against any invasion of it. The division of our courts of record into two departments, the one for the judging of the law, the other for judging of the facts, is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the legislature intended to furnish; but their purpose was to lay down an inflexible rule of practice—that the judge of the law should not undertake to decide the facts. *If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo.* * * * This we suppose has been to maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was without some such provision constantly in danger from the will of the judge acting upon men mostly passive in their natures, and disposed to shift off responsibility; and in danger also from the ever-active principle that power is always stealing from the many to the few."

The court has said in State *vs.* Davis, 15 N. C. 612, speaking by Gaston, J.: "It is obvious that if we confine ourselves to the *words* of this statute (act of 1796), there is no ground for the complaint which we are now considering. But it has been long since settled that the litteral is not the true interpretation of the act. Solicitous to discover and faithfully to carry into execution the legislative will, this court has fixed its intention upon the purposes declared in the act, and has given to it such a construction as, it believed, would most effectually accomplish these purposes. * * * But if in doing all this, he (the judge) intimates his individual opinion as to the existence or non-existence of a controverted fact; on which side of the controversy he believes the truth to be, or which of the witnesses he regards as having the higher claims to respect for his accuracy and probity, he overleaps the boundary of duty and invades the peculiar and exclusive province of the jury."

This court has said in State *vs.* Jones, 67 N. C. 285: "This (the statute) has been held to mean that the judge shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of the evidence. This construction, in the last particular, *goes beyond the words of the act*, but it is accepted as a proper one."

In State *vs.* Dixon, 75 N. C. 275, this court has said: "This
64 statute is but in affirmance of the constitution, article 1 sections 13–17; and the well-settled principles of the common law as set forth in *Magna Charta*. The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and *any inference* by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law."

In Crutchfield *vs.* Railroad, 76 N. C. 320, this court granted a *venire de novo* because the judge below in his charge to the jury said that "it was not denied but that Dr. Bahnsen was a gentleman of unquestionably high character in his profession and that he appeared to be a gentleman of culture." In that case the court says, on page 324, "Nor does it matter if his honor was (if he was) speaking of another part of Dr. Bahnsen's testimony when he put his estimate upon him as a physician of high character and a gentleman of culture. That was the mark put upon the *man* and it attached to every part of his testimony. A judge ought not to state to the jury his estimate of a witness or how he appears to him."

In MacRae *vs.* Lawrence, 75 N. C. 289, a new trial was granted by this court because the judge below, referring to two witnesses whose testimony was conflicting, charged the jury "that both the witnesses were gentlemen and that it was a pure matter of memory." This court holding that such an expression was fatal error, says: "Again, one of two witnesses, where they differ, may be corrupt. And the party against whom his evidence is may so insist before the jury, and his honor cannot tell the jury that he is not corrupt but that he is a 'gentleman.'"

If it is fatal error for the court to tell the jury that the principal

witnesses on each side are *both* gentlemen, how much greater error is it for the judge to single out the prosecuting witness alone, and say that he is a gentleman of such high character that his veracity must not be questioned.

But it is said that this remark was made before the jury was empanneled. With all due respect for the court, this seems to me the purest technicality. If it is not *haerens in cortice*, it is because it does not reach the inner bark.

65 It is true the jury had not been *empaneled*, but the case had been acIled for trial and the regular venire was in the jury-box. The remark was not a mere "passing compliment" but a statement of fact upon which his honor based his ruling on a motion in the action itself. It did all the harm it could have done if it had been in the charge, and is clearly in violation of the act which this court has repeatedly said in substance confers no new right, but is simply in affirmance of the constitution of this State and the principles laid down in *Magna Charta*.

And yet it is proposed to overrule so many cases, and establish so dangerous a precedent, upon an immaterial ruling in Jacobs' case sustained by a mere dictum in Jackson's. Let us examine those cases. When Jacobs' case was here in the 107th Reports, no allusion whatever was made to the point before us. When the case was first here, 106 N. C. 695, the court says: "It is difficult to see how the remark of the judge (that he had been informed by the jailer that he apprehended that Jacobs would escape if he had the opportunity) violated any provision of this statute. No juror had been selected, the remark was not in the presence of the jury, nor did it contain any opinion that 'a fact was fully or sufficiently proved.' No facts had been shown in evidence. Indeed, had the jury been empaneled, the statute prohibited the judge 'from expressing an opinion only upon those facts respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends.'" If the remark was not made in the presence of the jury, and would not have been improper even if the jury had been empaneled, what difference did it make whether the jury was empaneled or not?

In Jackson's case, 112 N. C. 851, the objectionable remark was made, not by the judge, but only by a *bystander;* and yet the opinion proceeds to say that "remarks made by the judge on such motions do not come within the prohibition of the statute." Citing State *vs.* Jacobs. As the judge had made no remark whatever, this was a pure dictum. And yet these two are the only cases which are even claimed to furnish any authority for the position of the court.

66 I come now to the last exceptions that I shall discuss. These two exceptions are addressed to the following portion of his honor's charge: "Reference has been made by counsel for the defence to the testimony of the witness Garrett and his course in connection with the apprehension and arrest of the defendants in connection with this charge, and has been made the subject of comment and criticism. The court therefore takes occasion to say that if the

evidence, as disclosed by the testimony of Garrett, satisfies you that he acted in the matter either for the purpose of detecting the defendants, having suspected them of an intention to cheat and defraud him, or if he acted under the belief that the representations and inducements held out to him were honest and true, and that in consequence of either of these beliefs he came to Greensboro to ascertain the truth of such impressions, then he acted within the provisions of the law, and his course is not the proper subject of criticism or adverse comment. The court in this connection charges you that there is no evidence that in any way connects him with the defendants in any charge of conspiracy to violate the law. If he comes to detect and apprehend the defendants in the commission of an intended crime, his course is not only proper but is commendable. If he came under the impression that the business transaction was a legitimate and honest one, by means of which he would be able to acquire legitimate and honest profit, then he had a right to come for such purpose, and it would not be a subject of criticism."

His honor apparently proceeded upon the assumption that there were only two possible constructions to place upon Garrett's conduct, either that his purpose was to detect crime or to engage in a legitimate business enterprise, one of which was proper and the other commendable. No other hypothesis seems to have entered his honor's mind, or to have been left to the jury. Taken in connection with his previous ruling as to Garrett's high character, what was left for the jury except to convict? If they believed Garrett, they must find at least two of the defendants guilty, Howard and Daley. Without Garrett, they could find no one guilty. The defendants did not introduce any testimony, but relied upon their legal presumption of innocence. If they could impeach Garrett they would be
67 acquitted, and this they attempted to do by a rigid cross-examination. Whether they succeeded was for the jury alone to say, without any intimation whatever from his honor as to the weight of the evidence or the credibility of the witnesses. The parts of Garrett's testimony relied upon by the defendants for his impeachment are thus set out in their brief: "Garrett, a man of wealth, is approached by defendant Howard and has laid before him a proposition to take him into partnership in a gold mine, with immediate compensation for a time at $25. per day and expenses, and incidentally the probable purchase by him, Garrett, of some $12,060. worth of gold. (Record 22, 23, 24) Howard at this interview exhibited a large roll of bills (Rec. 39) and paid Garrett $10. on account. (Rec. 25.) Garrett accepted this money and Howard left the office, having appointed a rendezvous two days later at Greensboro. Garrett testified that at this interview he made up his mind Howard was a confidence man (Rec. 42) and as the latter crossed the street on leaving Garrett's office, Garrett pointed him out to two of his employees, with the remark, 'If you want to see a genuine gold-brick man look out of the window, quick' (Rec. 18). His faith in Howard was so small that he even suspected the $10. bill paid him to be counterfeit (Rec. 18). What then was the duty of Garrett when his mind first reached the conclusion that Howard was a con-

fidence man, a 'gold-brick man.' Clearly it was to order him out of his office with a threat to denounce him to the authorities. He might well have gone farther. He might have informed the sheriff or the police of his interview and of his suspicions, leaving to them the duty of dealing with Howard and the others. What he did was to put himself into communication with the chief of police at Richmond, Va.; he wrote a long letter to Patterson, accompanying it with a letter of introduction of Mims from Lewis (Rec. 25). All this was to lay an elaborate plan to apprehend the defendants, for whom, by the way, he believed there was a reward outstanding of $20,000. (Rec. 45). He then gave his letters to Mims, and so solicitous was he that there should be no failure of justice, and, incidentally, that he should not fail of the reward, that he gave Mims $20. or $25. for expenses (Rec. 45). Thus his arrangement for arrest having been completed, he set about enticing de-
68 fendants into a completion of the supposed objects of the conspiracy. He had previously, at his first interview with Howard, so far fallen in with Howard's plans as to make two drafts of a telegram, one to use if the Indian were amenable, the other in the event he were not (Rec. 17). On the second day after the interview with Howard, Garrett proceeded to Greensboro to keep the appointment. On arrival he saw Mims and Patterson to whom for 30 minutes he talked 'pretty plainly' and was told that the sheriff had the matter in charge (Rec. 25, 28). There, also, he met Howard, and after he counted Howard's money for him (Rec. 26), the two drove out in a buggy to the place where the Indian was camped (Rec. 29, 30). On this drive, Howard showed signs of backing out, but Garrett urged him on—not once but several times. The sheriff and Patterson passed them on the road. Howard thought they looked suspicious, but Garrett, mindful of his civic duty and the reward and the roll of bills he had just counted, ridiculed the notion. The sheriff and Patterson were 'just two fellows that had been down town and got drunk.' Again, Garrett said 'The next time you stop I am going to take the horse and buggy and go back to town' (Rec. 31). When they arrived at the Indian's camp, Garrett suggested that Howard tell the Indian that he, Garrett, was Andrew Garrett's brother. 'You tell him I'm Andrew Garrett's brother' (Rec. 38). The alleged gold bars were then produced, and just as the weighing was completed the officers closed in and arrested Howard and Daley (Rec. 35). This successfully completed the first half of Garrett's plan. In Com. *vs.* Shea, 9 Phil. 569, which was a case where certain parties induced a saloon-keeper to sell them beer in violation of the Sunday liquor law for the purpose of informing on him, Judge Paxson said: 'For the relators it was urged that they were engaged in a lawful object, to wit, the enforcement of the Sunday liquor law. * * * It was never intended that a man should violate the law in order to vindicate the law.' * * * Immediately after the returning from the scene of arrest, Garrett went to the office of King & Kimball, attorneys-at-law and retained them to appear in the criminal prosecution; and also being still mindful of his civic duty, to prosecute a civil suit for $2,000 against these de-

fendants for an alleged breach of contract (Rec. 48, 49). In
69 aid of this suit he caused an attachment to be levied on the clothes, trunks, jewelry and other personal effects (Rec. 49, 76, 77) including the roll of bills displayed by Howard at their first interview, and which he had kindly counted for Howard at Greensboro just before the arrest. Having secured everything in sight, even to their changes of underwear, this good citizen leaves the State of North Carolina to pay the expenses of defendants in this suit by compelling them to defend *in forma pauperorum*."

Upon this review of the testimony of the prosecuting witness as relied upon by the defendants, it seems to me clear that his honor committed fatal error in his charge, and that a new trial should be granted.

I have given much attention to this case, more than my official duties would justly allow, and much more than the defendants apparently deserve; but I am firmly convinced that there is nothing more dangerous than to attempt to stretch established principles to meet the supposed exigencies of particular cases. I cannot do better than close this opinion with the words of Chief Justice Chase in the concurring opinion in *Ex parte* Milligan, 4 Wall. 2, 132, as follows: "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict even upon the guilty, unauthorized though merited justice."

70 STATE vs. HOWARD. } # 289. Guilford.

FURCHES, *C. J.*, dissenting:

Without affirming all that is said by my brother Douglas in the elaborate and learned discussion in his dissenting opinion, I cannot say that I am satisfied that the defendants have had a fair trial. In my opinion there is error, at least, in what the judge said as to Garrett's high character on the motion to separate the witnesses and in what he said near the close of his charge to the jury, that Garrett's conduct was not a proper subject for unfriendly comment.

In my opinion there should be a new trial.

Supreme Court of North Carolina.

I, Thomas S. Kenan, clerk of said court, do hereby certify the above to be true and correct copies of the concurring and dissenting opinion in the case of State *v.* Howard and others, as appear from the originals on file.

In witness whereof I have hereunto set my hand and seal of said court at Raleigh, Dec'r 16, 1901.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

71 Ex. B.

NORTH CAROLINA, }
Guilford County. }

Before the board of county commiccioners.

JULY 2ND, 1894.

The board of commissioners met as per adjournment and all members of said board present, namely, J. H. Millis, W. E. Bevill, J. C. Bunch, C. A. Boone and N. A. Hanner, and the following business was transacted:

Ordered by the board that W. E. Bevill, J. C. Bunch and J. H. Millis act as a committee to look after and arrange for working county convicts on the public roads, and that S. W. H. Smith and J. H. Gilmer be requested to meet with them in the register's office July 9th 1894 at 3 o'clock p. m.

REGISTER'S OFFICE, *July 9th*, 1894—at 3 o'clock p. m.

The committee appointed July 2nd met and after consultation and investigation postponed purchasing road machines, etc., until the August meeting or at such time before then as the committee, W. E. Bevill, J. H. Millis and N. A. Hanner may see proper to make such purchases. It was agreed that the county commissioners would only buy machinery at present and that the three named commissioners above are a purchasing committee and are authorized to buy such machines and tools and fixtures as they may see proper at such time as they may deem best.

SEPTEMBER 4TH, 1894.

The board met this day to make arrangements for working county convicts on public roads and to test the new road machine, after which test the board accepted the machine paid for it and appointed Lee Burgman as general manager of the county convicts and also to see after all the machinery, etc., on the road. At above meeting the following resolution was adopted.

Resolved I, That W. E. Bevill of our number be and he is
72 hereby fully authorized and empowered to employ such person as he may deem advisable and on such terms and for such compensation as shall be agreed on to be chief overseer of all convicts assigned to or to — assigned to and to be worked on the public roads in this county under chapter 355, Laws of 1887, and all acts amendatory thereof till the further orders of this board and with the further powers to build or otherwise provide for all needed building- and stockades etc., for the keeping of such convicts and to employ all necessary guards and furnish same with guns and such

other arms as he may deem advisable and to buy, hire for both tools machines teams etc., and do and perform such other things and acts as may be necessary to give effective operation to the resolution passed by the board of justices June last and to this resolution: That in order to carry this suggestion — all orders or warrants for money drawn by the said Bevill on the county treasurer shall be paid by such treasurer in settlement of such claims or debts as the said Bevill shall make in carrying out and giving force to this resolution and of all his acts and doings said Bevill shall make report as often as this board shall demand same.

I do hereby certify that the above is a true and correct copy of the minutes of the board of county commissioners of Guilford county.
This the 27th day of December 1901.

[Seal Office of Register of Deeds, Guilford Co., North Carolina.]

A. G. KIRKMAN,
Register of Deeds of Guilford Co., N. C.

73 And be it further remembered that on the 28th day of December, 1901, at 10 o'clock a. m. in accordance with the order theretofore made as hereinbefore set forth there appeared before the Hon. Thos. R. Purnell, sitting as the circuit court of the United States for the eastern district of North Carolina and in the courtroom of said court, the said petitioners in person and by their attorneys W. P. Bynum, Jr., and L. A. Gilmore; and the said respondent Capt. J. M. Fleming, warden of the penitentiary of North Carolina in person and in his custody bringing the said petitioners and being represented by A. L. Brooks, and T. B. Womack as attorneys, and thereupon said petition of the petitioners and the return of said respondent and the replication thereto of petitioners were by the respective counsel presented to said Hon. Thos. R. Purnell, presiding as circuit judge of said court, and upon due consideration thereof by said court the said court made and entered in said cause an order that the petition be dismissed and the petitioners be remanded to the custody of said warden, to which said order, then and there the petitioners duly excepted, which exception was then and there by the court allowed and signed and sealed and the petitioners thereupon prayed an appeal upon said order and judgment of the court to the Supreme Court of the United States, on their peti-on with assignments of errors in words the following that is to say.

74 In the United States Circuit Court for the Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley, Petitioners,
vs.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina, Defendant.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and to his associate justices and to the Honorable Thomas R. Purnell, district judge of the United States for the eastern district of North Carolina, sitting as circuit judge of the United States circuit court for said district, Greeting:

Comes now J. L. Howard, alias Frank Thompson and A. L. Daley alias Gonez Bono and H. D. Hawley, petitioners in the above-entitled cause and respectfully represent to the court that they and each of the- are ag-rieved by the judgment of this honorable court in the above cause entered on the 28th day of December 1901 and hereby prays that they be allowed an appeal therefrom to the United States Supreme Court; for the reasons specified in the assignment of errors, filed herewith, and they pray that said appeal may be allowed them and that the files and record in said cause may be sent to the Supreme Court of the United States; and that they may be allowed their liberty pending a hearing and disposition of said cause on appeal upon terms of reasonable bail to be fixed by this honorable court.

J. L. HOWARD,
H. D. HAWLEY,
A. L. DALY,
By L. A. GILMORE,
Their Attorney.

L. A. GILMORE,
W. P. BYNUM, JR.,
Attorneys for Petitioners.

Appeal allowed.

THOS. R. PURNELL,
U. S. Judge, &c.

[Endorsed:] No. 467 civil. Order allowing appeal.

75 In the United States Circuit Court for the Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley
vs.
Capt. J. M. FLEMING, Warden of Prison of North Carolina.

Assignment of Errors.

And now come the above-named petitioners J. L. Howard, alias Frank Thompson A. L. Daley alias Gonez Bono and H. D. Hawley by W. P. Bynum, Jr., and L. A. Gilmore their counsel, said J. L. Howard, A. L. Daley and H. D. Hawley being about to pray this court for an appeal from said court to the United States Supreme Court; and assign the following errors in the above cause, in and from and upon the judgment of said circuit court of the United States for the eastern district of North Carolina.

First. The court erred in not finding from the record and proofs in said cause that the grand jury drawn, and empaneled at the June term of the Guilford county superior court of North Carolina was an illegal body, whose acts were whol-y void; and that the indictment returned by such grand jury on the 5th day of June 1901 in said superior court was void; and that said grand jurors so acting did thereby as the agents and officers of the State of North Carolina deny your petitioners the due and equal protection of the laws of the said State.

Second. The court erred in not finding as a fact and holding as its judgment that the judge of the superior court of Guilford county in said State at the June term thereof 1901 and on the 5th day of said month and as the agent and officer of the State of North Carolina in accepting and allowing to be filed in said court said indictment descriminated against and denied to your said J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of said State of North Carolina.

76 Third. The court erred in not finding and holding as its judgment in said cause that the judge of the superior court of Guilford county as the agent of said State of North Carolina denied J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of *te* the laws of said State in "not instructing the petit jury empaneled to and before whom they were tried that they were by the law presumed innocent and which presumption attended them until overcome by positive evidence of guilt.

Fourth. The court erred in not finding and holding as its judgment that the judge of said Guilford superior court had no jurisdiction of the subject-matter of said indictment, or of the persons of J. L. Howard, A. L. Daley or H. D. Hawley or the jurisdictio*tion*, right or power to enter against them judgment in the words, as follows:

Judgem-nt of the court that J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that H. D. Hawley be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that A. L. Daley, alias Gonez Bono be imprisoned in the State penitentiary for the term of seven years; and that its jud-ment so entered was a denial to said J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of North Carolina in violation of the 14th amendment of the Constitution of the United States and hence void.

Fifth. The court erred in not finding as a fact and holding as its judgment that "a conspiracy to cheat and defraud" was and is not an offence known to the law of North Carolina statutory or other or justiciable or punishable by its courts; and that in consequence the indictment, conviction, judgment, sentence by said Guilford superior court and its affirmance by the supreme court of North Carolina was not due process of law and the detention and confinement of J. L. Howard, A. L. Daley and H. D. Hawley thereunder in the penitentiary of said State was a denial to J. L. Howard,
77 A. L. Daley and H. D. Hawley the equal protection of the laws of North Carolina by the courts thereof and void under the laws thereof and in contravention of the 14th amendment to the Constitution of the United States; and not discharging J. L. Howard, A. L. Daley and H. D. Hawley from confinement and detention *of* in the penitentiary of North Carolina and from the custody of Capt. J. M. Fleming warden thereof.

Sixth. For that the court erred in not discharging petitioners J. L. Howard, alias Frank Thompson; A. L. Daly alias Gonez Bono and H. D. Hawley on their petition; return of respondent Capt. J. M. Fleming, warden of penitentiary of North Carolina to the writ of *habeas corpus* issued thereon; replication of said petitioner thereto and the proofs in support thereof adduced and submitted at the hearing thereof before said court.

Seventh. For that the court erred in dismissing petitioners' petition for the writ of *habeas corpus* and remanding them and each of them to the custody of Capt. J. M. Fleming, warden of the penitentiary of North Carolina on the record made and urged before said court at the final hearing and submission of said cause.

Eighth. Because the judgment of said court herein is against the law on the record and facts in said cause.

L. A. GILMORE,
W. P. BYNUM, JR.,
Attorneys for Appellants.

[Endorsed:] No. 467 civil. Assignment of errors.

78 In the United States Circuit Court for the Eastern District of North Carolina.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ BONO, and H. D. HAWLEY
vs.
Capt. J. M. FLEMING, Warden of the Prison of North Carolina.

Assignment of Errors.

And now comes the above-named petitioners J. L. Howard, alias Frank Thompson A. L. Daley, alias Gonoz Bono and H. D. Hawley by W. P. Bynum Jr. and L. A. Gilmore their counsel, said J. L. Howard, A. L. Daley and H. D. Hawley being about *the* pray this court for an appeal from said court to the United States Supreme Court; and assigns the following errors in the above cause, in and from and upon the judgment of said circuit court of the United States for the eastern district of North Carolina.

First. The court erred in not finding from the record and proofs in said cause that the grand jury drawn, and empaneled at the June term of the Guilford county superior court of North Carolina was an illegal body, whose acts were wholly void; and that the indictment returned by such grand jury on the 5th day of June 1901 in said superior court was void; and said grand jurors so acting did thereby as the agents and officers of the State of North Carolina deny your petitioners the due and equal protection of the said State.

Second. The court erred in not finding as a fact and holding as its judgment that the judge of the superior court of Guilford county in said State at the June term thereof 1901 and on the 5th day of said month and as the agent and officer of the State of North Carolina in accepting and allowing to be filed in said court said indictment discriminated against and denied to said J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of said State of North Carolina.

79 Third. The court erred in not finding and holding as its judgment in said cause that the judge of the superior court of Guilford county as the agent of said State of North Carolina denied J. L. Howard A. L. Daley and H. D. Hawley the equal protection of the laws of said State in "not instructing the petit jury empaneled to and before whom they were tried that they were by the law presumed innocent and which presumption attended them until overcome by positive evidence of guilt."

Fourth. The court erred in not finding and holding as its judgment that the judge of said Guilford superior court had no jurisdiction of the subject-matter of said indictment, or of the persons of J. L. Howard A. L. Daley or H. D. Hawley or the jurisdiction, right or power to enter against them judgment in the words as follows:

Judgment of the court that J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that H. D. Hawley be imprisoned in the State penitentiary for the term of ten years.

Judgment of the court that A. L. Daley, alias Gonoz Bono be imprisoned in the State penitentiary for the term of seven years; and that its judgment so entered was a denial to said J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of North Carolina in violation of the 14th amendment of the Constitution of the United States and hence void in this:

1st. That said punishment was different and more severe in kind, and different and more severe in degree that has ever been meted out by the cours*t* of said State to its own citizens or residents for offenses similar to that attempted to be described in said indictment.

2nd. That said punishment is not authorized by the statutory law of said State to be inflicted on the citizens thereof.

3rd. That said punishment is cruel and unusual within
80 the meaning of the prohibitory laws of the North Carolina constitution as interpreted by the courts of said State, and applied by said courts to the citizens of said State; and is hence a discrimination against these appel-ants, citizens of the United States.

4th. That said punishment is "cruel and unusual" as that phrase is used in the 8th amendment to the Constitution of the United —.

Fifth. The court erred in not finding as a fact and holding as its judgment that "conspiracy to cheat and defraud" was and is not an offense known to the law of North Carolina statutory or other or justiciable or punishable by its courts; and that in consequence the indictment, conviction, judgment, sentence by said Guilford superior court and its affirmance by the supreme court of North Carolina was not due process of law and the detention and confinement of J. L. Howard, A. L. Daley and H. D. Hawley thereunder in the penitentiary of said State was a denial to J. L. Howard, A. L. Daley and H. D. Hawley the equal protection of the laws of North Carolina by the courts thereof and void under the laws thereof and in contravention of the 14th amendment to the Constitution of the United States and in not discharging J. L. Howard, A. L. Daley, and H. D. Hawley from confinement and detention in the penitentiary of North Carolina and from the custody of Capt. J. M. Fleming, warden thereof.

Sixth. For that the court erred in not discharging petitioners J. L. Howard alias Frank Thompson; A. L. Daley alias Gonez Bono and H. D. Hawley on their petition; return of respondent Capt. J. M. Fleming, warden of penitentiary of North Carolina to the writ of *habeas corpus* issued thereon; replication of said petitioner thereto and the proofs in support thereof adduced and submitted at the hearing thereof before said court.

Seventh. For that the court erred in dismissing petitioners' petition for the writ of *habeas corpus* and remanding them and each of them to the custody of Capt. J. M. Fleming, warden of the penitentiary of North Carolina on the record made and urged before
81 said court at the final hearing and submission of said cause.

Eighth. Because the judgment of said court herein is against the law on the record and facts in said cause.

L. A. GILMORE,
W. P. BYNUM, JR.,
Attorneys for Appellants.

The above assignments of error may go up as a part of the record on appeal.

T. B. WOMACK,
Atto. for D'f't.

82 In the United States Circuit — for the Eastern District of North Carolina, at Raleigh.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ BONO, and H. D. Hawley
vs.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina.

J. L. Howard, A. L. Daley and H. D. Hawley each for himself being first duly sworn each for himself hereby deposes and says that they are confined in the penitentiary of the State of North Carolina at the city of Raleigh on a judgment entered against them by the superior court of North Carolina from the fifth judicial district at the county of Guilford in said State and affirmed by the supreme court of said State in the words and figures as follows that is to say:

Judgment of the court that J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for a term of ten (10) years.

Judgment of the court that H. D. Hawley be imprisoned in the State penitentiary for the term of ten (10) years.

Judgment of the court that A. L. Daley alias Gonez Bono, be imprisoned in the State penitentiary for the term of seven (7) years.

That the said judgment so entered against affiants by said superior court of Guilford county and affirmed by said State supreme court is void because neither of said courts had power or jurisdiction to enter or affirm the same and that your petitioners are now wrongfully imprisoned and held in the penitentiary of the State of North Carolina wrongfully and unlawfully thereunder.

That affiants have heretofore to wit on the 18th day of December 1901 filed in this court their petition for *habeas corpus* setting up as grounds therein that said Guilford superior court had so entered said judgment against them without the power and jurisdiction so
83 to do in this that the grand jury returning the bill of indictment into said Guilford superior court to the June term thereof 1901 was illegally drawn, summoned and empaneled and was an illegal body whose acts were void and that the bill so returned was void and insufficient to give to said Guilford superior court power and jurisdiction to put affiants to answer and trial on said indictment wherein affiants were charged by the State of North Carolina with the offence of "conspiracy;" nor to enter judgment therein against affiants as above set forth; and that *that* said judgment so entered was against the laws of the State of North Carolina because there was nor is any law in said State statutory or other authorizing such charge against affiants and no law in said State authorizing said judgment *a* and sentence against them or either of them and that the same was whol-y void.

Affiants further say that they are poor persons and that they and

each of them have not any money or property whatever in possessio- or available wherewith to pay the expences and costs of this proceeding in this court or the costs and expences in the appeal thereof in the United States Supreme Court; but that they are informed and believe that they are so wrongfully imprisoned and restrained of their liberty in said penitentiary of the State of North Carolina and that they have a good and meritorious cause stated in their petition for *habeas corpus* in this court and that they are justly aggrieved by the judgment of this honorable court remanding them to the custody of the warden of the penitentiary of North Carolina; and that they have prayed an appeal from the judgment of this honorable court to the United States Supreme Court in good faith and because of their unlawful detention in said penitentiary as aforesaid.

Wherefore affiants pray the order of this honorable court allowing affiants leave to proceed further in their said cause in this court and to appeal the same in the United States Supreme Court as poor persons and without advancing costs in that behalf.

J. L. HOWARD.
A. L. DALY.
H. D. HAWLEY.

84 Subscribed and *and* sworn to before me this 30th day of December, A. D., 1901.

[Seal of J. M. Broughton, Notary Public, Raleigh, N. C.]

J. M. BROUGHTON,
Notary Public.

[Endorsed:] No. 467 civil. Joint affidavit of petitioners. Filed Dec. 30, 1901.

85 UNITED STATES OF AMERICA, }
Eastern District of North Carolina. }

In the Circuit Court.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley
v.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina.

Upon considering the petition and affidavits of the above petitioners, under chapter 209, 27 Stat. at Large;

It is ordered that the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley, be allowed to prosecute their appeal and prosecute their appeal in the above-entitled action without prepaying fees and costs or without giving security therefor:

It is further ordered that the officers of court issue, serve all process and perform all duties in this behalf.

THOS. R. PURNELL,
U. S. Judge, &c.

86 Circuit Court of the United States for Eastern District of North Carolina.

In re J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley, Petitioners,
vs.
Capt. J. M. FLEMING, Warden of State's Prison of North Carolina, Respondent.
} Proceedings in *Habeas Corpus.*

It is hereby stipulated by and between the parties to the above-entitled cause that the clerk of said court may transmit the original transcript in said cause to the clerk of the Supreme Court of the United States instead and in lieu of a copy thereof.

Witness our hands and seals this 11th day of January A. D. 1902.

J. L. HOWARD,
A. L. DALEY, AND
H. D. HAWLEY,
By their attorney-, BYNUM & BYNUM.
ROB'T D. GILMER,
Attorney General of North Carolina,
By T. B. WOMACK.
T. B. WOMACK,
Attorney for State of N. C.

[Endorsed:] Stip. as to transcript.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Capt. J. M. Fleming, warden of State's prison of North Carolina, and T. B. Womack and J. L. Brooks, attorneys general of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court at Washington D. C. within thirty days from the date hereof, pursuant to a plea filed in the clerk's office of the circuit court of the United States for the eastern district of North Carolina wherein J. L. Howard, alias Frank Thompson A. L. Daley alias Gonez Bono and H. D. Hawley are plaintiffs in error, and Capt. J. M. Fleming, warden of State's prison of North Carolina is defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error by the circuit court of the United States for the eastern district of North Carolina from which said plaintiffs in error were by said circuit court allowed an appeal to said United States Supreme Court, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court this 6 day of February in the year of our Lord one thousand nine hundred and two.

THOS. R. PURNELL,
U. S. Judge, &c.

We the undersigned Capt. J. M. Fleming, warden of State's prison of North Carolina, and T. B. Womack and J. L. Brooks attorneys general of said State hereby accept service of above citation this 6 day of February A. D. 1902.

JNO. M. FLEMING,
Warden of State's Prison of N. C.
T. B. WOMACK,
——— ———,
Attorneys General of N. C.

[Endorsed:] Citation.

88 UNITED STATES OF AMERICA,
Eastern District of North Carolina.

In the Circuit Court.

In re J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias Gonez Bono, and H. D. Hawley, Petitioners,
v.
Capt. J. M. FLEMING, Warden of the State's Prison of North Carolina, Respondent.

It appearing by stipulation of counsel filed as a part of the record herein, representing all parties to the above-entitled cause, that all papers, documents and exhibits filed with the clerk of this court, as constituting the original record in said cause, may be transmitted to the Supreme Court of the United States in lieu of a transcript or copy thereof;

It is ordered that the clerk of this court may in conformity to such agreement, filed herein, send all papers, documents and exhibits, on file as aforesaid to the Supreme Court of the United States, as constituting the said cause on appeal in lieu of a copy thereof.

Feb. 6th, 1902.

THOS. R. PURNELL,
U. S. Judge, &c.

89 UNITED STATES OF AMERICA,
Eastern District of North Carolina.

In the U. S. Circuit Court.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ Bono, and H. D. Hawley
v.
Capt. J. M. FLEMING, Warden State's Prison of North Carolina.

I, N. J. Riddick, clerk of the U. S. circuit court for the eastern district of North Carolina, in pursuance of the stipulation of counsel representing the plaintiff in error and counsel representing the defendant in error, and the order of the presiding judge, both of which are sent up as a part of the record herein, *I* do hereby certify the attached record, in lieu of a transcript thereof as embracing and

constituting the said cause on appeal to the Supreme Court of the United States.

I do further certify it was agreed by counsel aforesaid that all papers, documents and exhibits above transmitted shall embrace the said cause on appeal.

Witness my hand and official seal, this 4th day of March, 1902.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk U. S. Circuit Court, Eastern Dist. of North Carolina.

O K.
T. B. W.

90 [Endorsed:] No. 467 civil J. L. Howard *et al.* plff's in error *vs.* J. M. Fleming, warden &c. def't in error Copy of record sent up under stipulation of counsel & order of court.

91 EXHIBIT A OF THE RESPONDENT'S RETURN.

In the Supreme Court, State of North Carolina, October Term, A. D. 1901.

STATE OF NORTH CAROLINA
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley.

Defendants' Statement of Case on Appeal to the Supreme Court.

L. A. Gilmore, Bynum & Bynum, John A. Barringer, attorneys for defendants.

92 Superior Court, State of North Carolina, Guilford County, June Term, A. D. 1901.

STATE OF NORTH CAROLINA
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley.

Defendants' Statement of Case on Appeal to the Supreme Court.

This was a criminal cause originating in said court upon indictment duly returned, a true bill by the grand jurors of said county, to the June term, 1901, of said court, and tried at that term before counsel judge and a jury, which indictment is in the words following, that is to say:

"STATE OF NORTH CAROLINA,
Guilford County.

Superior Court, June Term, A. D. 1901.

Indictment—First Count.

"The jurors for the State, upon their oath present, that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March, A. D. 1901, with force and arms at and in the county
93 aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest practices, in secrecy, with deceit and intent to defraud, among themselves unlawfully, willfully, fraudulently, feloniously and deceitfully did combine, conspire, confederate and agree together by divers false pretenses and subtle means and devices, to obtain from one Paul Garrett, large sums of money, and him the said Paul Garrett to cheat and defraud out of his monies, goods and chattels contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

Second Count.

"Second count. The jurors for the State upon their oath do further present, that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March, A. D. 1901, being persons of fraudulent minds and evil dispositions and wickedly devising and intending to rob one Paul Garrett of his monies, goods and chattels, did unlawfully, wickedly and feloniously conspire, combine, confederate and agree together, in and upon one Paul Garrett in the peace of God and of the State then and there being, feloniously to make an assault and him the said Paul Garrett, in bodily fear and danger of his life, then and there feloniously to put, and the monies, goods and chattels of the said Paul Garrett from the person and against the will of the said Paul Garrett, then and there feloniously and fraudulently to steal, take and carry away as by the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley had been mutually agreed and undertaken to do; to the
94 evil example of all good citizens and against the peace and dignity of the State.

Third Count.

"Third count. The jurors for the State upon their oath do further present, that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, late of the county of Guilford, being persons of fraudulent minds and dispositions and wickedly devising and intending to cheat and defraud the said Paul Garrett of his monies, goods, chattels and property, did on the 20th day of March, A. D. 1901, in the county of Guilford, aforesaid, feloniously, wickedly

and deceitfully combine, conspire, confederate and agree together to cheat and defraud the said Paul Garrett of his monies, goods, chattels and property as aforesaid by the false and deceitful color and pretenses as follows, to wit:—By him, the said J. L. Howard, alias Frank Thompson, pursuant to a conspiracy, confederation and agreement theretofore had and made between him and his co-conspirators above named, falsely, fraudulently and deceitfully pretending and representing to the said Paul Garrett, that he, the said J. L. Howard, alias Frank Thompson, and his associate and confederate, Gonez Bono, alias A. L. Daley, were then and there the owners of and in possession of large blocks of gold as well as the owners of large and valuable mining interests in Arizona, which said gold was held by the said Gonez Bono on Buffalo creek, near the city of Greensboro, where the said Paul Garrett was then and there taken and the said blocks of metal then and there shown him; and the said J. L. Howard, alias Frank Thompson, pursuant to the conspiracy theretofore had and made, pretended that the said blocks of metal were solid gold 22 karats fine, and of the value of many thousands of
95 dollars which they offered to demonstrate by a chemical analysis to be made by their said co-conspirator, H. D. Hawley, who was then and there waiting near by in the city of Greensboro with an assayer's outfit to fraudulently and falsely analyze and assay said spurious metal and pronounce it pure gold, thereby aiding his co-conspirators in the execution of their common, fraudulent and felonious design to cheat and defraud the said Paul Garrett, in pursuance of a common conspiracy and confederation had and made by and between the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley. And the said J. L. Howard, alias Frank Thompson, then and there sought to dispose of and sell to the said Paul Garrett the said blocks of metal for large sums of money; whereas in truth and in fact the said blocks of metal falsely and fraudulently represented to be gold were not gold but of a cheap and comparatively worthless metal, by means of which said false, fraudulent and felonious representations, the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and the said H. D. Hawley sought and attempted to obtain unjustly and unlawfully large sums of money from the said Paul Garrett contrary to the form of the statute in such cases provided, and against the peace and dignity of the State.

(Signed) "BROOKS, *Solicitor.*

Returned true bill. This indictment was regularly endorsed and returned "a true bill" by the foreman of the grand jury.

That on the fifth day of June, 1901, being the second day of the said term in said court, said defendants by

Counsel in case. their counsel L. A. Gilmore, Bynum & Bynum and John Barringer, called upon A. L. Brooks,

Motion for bill of particulars. 96 solicitor for the State, for a bill of particulars in said cause and as to each count of said indictment, and were by him

informed in open court that he could give no further particulars than appeared in the several counts of the indictment; whereupon the defendants moved the court for a rule on the State solicitor, A L. Brooks, for a bill of particulars, and for the granting of such motion specified that said defendants, through their solicitors had theretofore called upon A. L. Brooks, solicitor for the State, for a bill of particulars with respect to the first, second and third counts of said indictment; and because the said indictment and each count thereof are insufficient in this; that the first count thereof does not inform the defendants of the nature and cause of the accusation against them; that the certain pretenses, subtle means and devices are not therein set out and described; nor the cheat nor fraud described, nor the amount of the money intended to be obtained or that it was good and lawful money of the United States, nor of any value in good and lawful money of the United States; nor what the goods and chattels were or that they were of any value; that second count thereof does not inform the defendants of the nature and cause of the accusation against them nor state nor show sufficient facts as means or ends to constitute a crime; and that third count thereof does not inform the defendants of the nature and cause of the accusation against them nor what the intended cheat or fraud was nor the amount of the money so intended to be obtained or that it was good and lawful money of the United States or of any value as money of the United States; nor what the goods, chattels or property were nor the amount thereof or that they were of any value; nor state nor show sufficient facts as means or end to constitute a crime.

97 Because said indictment and each count thereof are otherwise informal and so general, indefinite and uncertain that no plea of former conviction or acquittal could be pleaded to a second prosecution.

Motion for bill of particulars denied.

1st ex. That said motion of the defendants was overruled by the court; to which ruling by the court defendants by their counsel then and there duly excepted.

That thereupon the defendants by their said counsel moved the court to quash said indictment and each count thereof by their motion in writing entitled in said cause and court, the body of which is in the words and figures following, to wit:

Motion to quash indictment.

"Now comes the defendants J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, in their own proper persons and by L. A. Gilmore, Bynum & Bynum, and John Barringer, their attorneys, and move the court to quash the bill of indictment returned against the said defendants and each and every count therein and for grounds therefor urge the following:

"First. For that the allegations in the said bill of indictment and in each and every count thereof do not constitute a crime under the ordinance of conspirators made and accorded by King Edward the First and his council in the 33rd

Grounds of said motion.

year of his reign, A. D. 1305, nor by any statutes in England since that date nor under any common law in force in the State of North Carolina at the date of said alleged offense.

"Second. Because the allegations in said bill of indictment and in each and every count thereof do not constitute a crime under the statutes of the State of North Carolina in force at the date of said alleged offense.

98 "Third. Because the common law with respect to conspiracies has been abrogated in the State of North Carolina by its constitution and legislative enactments upon the subject of conspiracy, to wit, the acts of 1868 and 1879, Code 1883, sections 974 and 1107, by neither of which said acts is the crime charged cognizable.

Motion to quash.

"Fourth. Because the alleged warrant upon which the defendants were arrested and held for their appearance at the June term of said court and the indictment against them do not constitute due process of law within the meaning of the 14th amendment of the Constitution of the United States.

"Fifth. Because the alleged crime sought to be charged against them in said indictment is not cognizable or punishable either under the common law nor under the statute of the State of North Carolina.

"Sixth. Because there is no statute of the State of North Carolina authorizing the said indictment, and the same is invalid and unconstitutional because it does not inform the defendants of the nature and cause of the accusation against them.

"Seventh. Because there being no statute of the State of North Carolina nor common law in force in said State authorizing said indictment nor denouncing a punishment for said alleged crime the same is contrary to the 14th amendment of the United States Constitution, in this that it is not due process of law; it denies defendants equal protection of the laws; it abridges the privileges and immunities of the defendants as citizens of the United States, said defendants being citizens thereof.

"Eighth. Because the said indictment and each count thereof are insufficient in this; that the first count thereof does not in-

99 form the defendants of the nature and cause of the accusation against them; that the certain pretense, subtle means and devices are not therein set out and described; nor the cheat nor fraud described nor the amount of the money intended to be obtained or that it was good and lawful money of the United States nor of any value in good and lawful money of the United States; nor what the goods and chattels were or that they were of any value; that second count thereof does not inform the defendants of the nature and cause of the accusations against them nor state nor show sufficient facts as means or end to constitute a crime; and that third count thereof does not inform the defendants of the nature and cause of the accusation against them nor what the intended cheat and fraud was nor the amount of the money so intended to be obtained or that it was good and lawful money of the United States or of any value as money of the United States; nor what the goods, chattels or property

were nor the amount thereof or that they were of any value; nor state nor show sufficient facts as means or end to constitute a crime.

"Tenth. Because the said indictment and each count thereof are otherwise informal and so general, indefinite and uncertain that no plea of former conviction or acquittal could be pleaded to a second prosecution."

Motion denied 2nd exception.

2nd ex. Which motion was overruled by the court, to which ruling of the court the defendants then and there excepted.

That thereupon the defendants and each of them pleaded not guilty to said indictment and to each count thereof.

That thereupon said cause was called for trial. Present A. L. Brooks, solicitor, assisted by Messrs. King and Kimball, attorneys for Paul Garrett; L.

Case called.

Motion to separate witnesses.

100 A. Gilmore, Bynum & Bynum and John Barringer, for defendants. And while the regular panel of jurors was in the court-room the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and impaneled and during the trial of said cause. The solicitor objecting, said that the witness Paul Garrett would be the first witness examined and the others would testify as to matters not in his knowledge, except the detection in Greensboro.

Whereupon the court remarked that it was a matter of discretion with the court, and that all the witnesses except the complaining witness, Mr. Garrett, and the high sheriff of the county, might be excluded from the court; but as to these witnesses their high character as citizens forbade the idea that either of them would be influenced by the testimony of the other.

3rd exception to remarks of court.

3rd ex. To which remarks of the court, the defendants, through their counsel then and there excepted.

That on Friday, June 7th, 1901, being one of the days of said term of the court, the State to prove its case produced and had sworn one, PAUL GARRETT, whose testimony so given, tended to prove in substance as follows:

Paul Garrett. Direct exam.

"My name is Paul Garrett; I live in Weldon, North Carolina. Saw the defendant, J. L. Howard, alias Frank Thompson, Wednesday morning, March 20th, 1901, about nine o'clock a. m. at my office in Weldon, N. C."

And was then asked by the said solicitor this question: "Q. Now you may go ahead in your own way and state to his honor and the jury the circumstances under which he came there, and what occurred between you?"

Objection as to venue.

101 To which question the defendants by their counsel, objected on the ground that the indictment alleged the offense charged therein and its venue as having been committed in Guilford county, and that the court would take judicial notice that Weldon was in Halifax county; and that

being so no acts or declarations by any one or more of the defendants occurring in any county other than Guilford were competent, relevant and material; and this because it related to another jurisdiction than the one alleged in the indictment, where the defendants might be prosecuted.

4th exc. 4th ex. Which objection was overruled by the court, defendants then and there by their counsel duly excepted.

The solicitor then announced to the court that he proposed to prove by witness certain declarations and acts that are to be afterwards so connected as to be evidence before the jury, of the conspiracy among the defendants now on trial; that if such acts and declarations of the defendant Howard are not so connected, then such will not be asked as evidence against the other defendants.

To which proffer by the State, defendants by their counsel objected, as same is not sufficient to authorize the testimony of certain acts and declarations of the defendant Thompson in a county other than Guilford and in the absence of the other defendants.

5th exc. 5th ex. Which objection was overruled by the court, with direction to witness to proceed; to which ruling of the court defendants, by their counsel, then and there duly excepted.

On the morning in question, as I before stated, I was dictating my correspondence to my stenographer. The door to the room was opened and a man appeared there. He was in the garb of a miner, or a laboring man of the better class. He asked if Mr. Gar-
102 rett was in. I replied that he was and asked what he wanted. He stated that he wished to have a private interview. I replied that I was busy at that time and that he would have to have a seat in the outer office. I finished the letter on which I was engaged and went into the next room and asked the gentleman what it was he wished. There was another clerk present, and he, looking over at him, said that he wished to see me privately. I stated that any business matter could be discussed in the presence of this clerk. He stated that he must see me entirely alone. So instead of stopping the clerk and sending him out, I went on the outside with him. Arriving at the outside he asked me if I had a brother named Andrew Garrett. I told him no, that I had no brother, that I never had but one and he died in infancy. He said that he was mighty sorry, that he was looking for Andrew Garrett's brother; that he was from Arizona; that Andrew Garrett was his partner there a number of years before, and that Andrew had come East in response to an invitation from an aunt of his, who lived in Charlottesville, Va., to take charge of her affairs; that she was quite a wealthy woman, and he had come to take charge of her affairs; that they had an understanding when he left, which was four years before, that any time either of them got anything good, they would acquaint the other with the fact. That in the meantime he had "struck it rich," and in company with an Indian chief—I think he said an Indian chief—he had come East to look for Andrew and to buy machinery for this mine. I cut him rather short; told him that, unfortunately, I was

neither Andrew nor Andrew's brother, and I did not see how I could serve him at all. He said it appeared to him like nobody wanted to talk to him; that everybody seemed to think he wanted to
103 get some money out of them. He pulled out his purse and exhibited quite a roll of money. I told him that I did not see where it interested me at all, that I was not Andrew's brother. Well he said they were in search of Andrew's brother, and they were coming along East, the Indian, whose name was Gonez Bono, had eaten a lot of trash on the train, candy and peanuts, etc., and had gotten sick, and at Greensboro he refused to go any further, and he had taken him off the train here and carried him out in the woods; that the Indian would not stay in the house, he had to have a camp in the woods. That he had gone on through Greensboro to Charlottesville, looking for Andrew, but when he got to Charlottesville he found that Andrew had died; that his aunt had moved to Washington city, and that he had asked of that family in Charlottesville, and he was told that at Weldon there was a man named P. Garrett; that he knew that Andrew had a brother named Peter Garrett, and he thought this might be the man; and he was mighty sorry I was not Andrew's brother. I told him that inasmuch as such good things were in view I was sorry myself that I was not Andrew's brother, but I didn't see how I could help it. I was not; that my name was Paul instead of Peter. We exchanged condolences on the death of Andrew and the absence of his brother, and the result of it was he said he had been making some inquiries about me before he got there, and found that I was pretty good at figures and an honest man, and that he was looking for such a man to look after the business of their affairs, that he was a very ignorant man, could not read nor write, nor make figures, and that they wanted some good reliable man to take charge of their business interests; that they had with them two bars of gold (he may have said chunks), two pieces of gold; and they were on their way to Philadelphia mint to sell the
104 same, and the proceeds of which were to be invested in mining machinery, outfit, etc. The conversation proceeded along those lines,—a good deal of repetition in it, and as confirming his statement about the circumstances, he gave me some incidents in his life of his trip East. That at Albuquerque, New Mexico, at which point I think he said he took the train to come East, he had met up with some character in that country whose business it was to keep an eye on every new mine that was started and cheat them out of their claims, and this fellow had tried to pump him out of his information, but he had been very discreet and had not said anything about the discovery of this gold mine; in confirmation of it he drew this from his pocket. It is an envelope purporting to be from a hotel in Minnesota; there was no address on it, but he had a clipping, which purports to be an extract from some newspaper. He handed it to me and asked me to read it to him. He said some fellow had read it to him, but he was not sure it was read right.

Which paper in substance was that, Frank Thompson and an Indian chief, named Gonez Bono, were on their way to Philadelphia to dispose of the product of a certain gold mine in Arizona, and

that they were very careful in not disclosing its location, or saying much in particular about it for fear that some one would discover its location and take it from them before they had filed their claim thereon.

That the defendant Thompson then said that the Indian, Gonez Bono, stopping at Greensboro, was the same that accompanied him there. That after exhibiting these pieces of paper and some other conversation along the same line, he also exhibited a little bag and began shaking it, and in it were specimens of ore and a little
105 gold bar, about, I suppose, three and a half or four (3½ or 4″) inches long, and one and a half (1½″) inches wide, one-tenth or one-eighth ($\frac{1}{10}$ or $\frac{1}{8}$″) of an inch thick. I think I could identify it, and it is among the effects. He showed them to me, and I handled them and handed them back, and still intimated that I did not see exactly what connection I had with the case, but that it was all mighty pretty and nice; and he then went on and said that as Andrew was dead and he could not find his brother, he didn't see why I couldn't look after it for him. He said they wanted a man to take charge of it for them, and would give him a third interest in it. I then went on to question him about the mine, how they had been working it. He said they had never had any machinery, excepting Indian squaws had "toted" part of the ore on their backs. They had gotten up this much gold in two years, and that there was a big thing in it for whoever would take hold of it and work it right. I told him that I had already taken great interest in gold-mining; had worked in a gold mine a short while, had familiarized myself with it, and had a little experience with gold-mining myself. He explained then the situation of the country, its location in the mountains, it was several miles, I think about 40 miles from —. The conversation drifted along these lines. Finally he wanted to know what I thought of it, and I told him that if there was anything in it I didn't know that I would object to take up a proposition. I asked him what would be expected of me. He said the first thing he wanted me to do was to go along with them to Philadelphia, and sell it to the mint. That they needed somebody that could figure and I said that I had no objection to going; that I was up for business. He said that, too, I would be expected to go with them by Washington city and file the
106 claim; that the claim had never been filed; that is was in the Indian reservation. "Well," I said, "that is going to require a good deal of time and absence from home, and I generally get pay for my services." Well he said they would give me one-third interest in the two gold bars. And I asked him what that would be. He said they would weigh about one hundred and fifty (150) pounds. Didn't know exactly; that somebody had weighed them for them. He seemed to be very suspicious of everybody. I asked him what it was worth. "Well, dat Jew at Albuquerque had bought ten (10 lbs.) pounds of it, and he give me twelve $20 gold pieces for dat much." He said there were one hundred and fifty pounds of it, about $36,000, and that he would give me one-third of it. I asked him what the mining outfit was going to cost, and he enu-

merated; and I figured that the mining outfit would cost $20,000 and there would be a balance left of $16,000, of which I was to have one-third. He asked me what my part would be. I told him it would be something like $5,000. He said he reckoned we could have a good time in Philadelphia on that after paying our expenses. I told him yes it might serve for a short trip. "But," said I, "I don't know anything about these gold bars. I want to see something beside that. If I leave my business, I will have to get somebody here to look after it for me." He wanted to know what I wanted for my services. I told him it was hard to place an estimate on my services, but I would not make a charge less than $25 a day to recompense me for my absence from my business and my expenses. He said he thought I put a pretty good value on my services. I told him I did. He said, well he didn't mind paying a good man,
for he wanted a good man, he wanted an honest man, and
107 that they told him I was honest; that he had met a man on
the train, and had inquired about me downtown, and he consented then to it, so far as he was concerned; said he would not mind if the Indian would not mind; he would have to see the Indian about it before he could consummate it. Wanted to know if I would not go back with him and see the Indian that afternoon. I told him that I had an engagement in Norfolk tomorrow, that I could not go this afternoon. I can't remember now, there were quite a number of questions passed. I said, "You go on to Greensboro. I will go to Norfolk. You want to go to Philadelphia. I I can go right over to Philadelphia, and get this matter transacted. I will make my arrangements to leave home." He said the Indian was mighty curious and mighty suspicious, and he was afraid he would not get him off. In fact he didn't have but twenty days' leave of absence from Col. Crook, and they had been off twelve days, and the Indian was getting restless and wanted to go back anyhow. I told him I did not know how I could help him then, that I could not break my engagement at Norfolk. He asked me if I could come to Greensboro. "Certainly," I said, "I can, but if you want to go to Philadelphia come by Norfolk, and I will go with you on these terms." Well, he said maybe we might arrange to do it, but he didn't know what he would do with the Indian. Then he asked me if I would not agree to go on Friday. But in the meantime he had gone on a good deal about the vast resources of this mine. It was plausible in one view and it was not plausible in another. It was mighty pretty. I told him then that if the Indian was willing and he would let me know at Norfolk, I would come back. He said they didn't have any time to lose. I said, "You can telegraph me at
Norfolk tomorrow." He wanted to know what a telegram was.
108 I said, "You write the message to me and carry it to the telegraph office and then send it to me." He wanted to know how that was, if they stuck it on the wires and they sent it to me. I explained. He seemed to be very much enlightened as to what a telegram was, and said that would work all right. But how was he going to manage it? He didn't want to take anybody else into his confidence. I said, "I will write out a telegram here and if the In-

dian is willing you can send it to me." He said that would be a good idea. So we then went into my office. All this conversation took place on the outside. The young man was still sitting there, and I took down a telegraph blank and wrote it. "Now," I said, "if Gonez is willing to this proposition, you will send this telegram." The telegram read, "Gonez willing; come at once; will meet at train." I signed it, at his suggestion, "Frank Thompson." "Now," he says, "Suppose the Indian is not willing?" I said, "Well, I will write another one." And I really cannot recall that one, but it was to the effect that Gonez refused to agree. I wrote the telegram and he said, "I can't tell one from the other." "Well," I said, "I will put a cross-mark in blue pencil on the one that means "yes;" on the other, not to come, I will put a round mark." And I made him repeat it. "You say you are going to pay my expenses?" He pulled out his purse and handed me a $10 bill. I looked at it pretty closely and put it in my pocket. We talked a little while on that line, and he asked me about the trains—when one went back. I told him shortly after noon. I told him I would meet him at the train. He went out and had to go round the corner of the house, and go back right in full view of my office, which has three compartments. The front office is occupied by two young men, and the rear offices, one of them is occupied by myself
109 and another young man, who hears everything that goes on of a business matter; and the one at the rear or at the farther angle is occupied by the stenographer, and I dictate my letters in that office generally. I walked into the office as he turned the corner, and I touched the two young men on the shoulder. I didn't want the stenographer to hear. I said, "If you want to see a genuine gold-brick man, look out the window quick." They both ran to the window. I said, "If he is not one, I never saw one." I rang the 'phone and called up the revenue officer at Littleton, N. C., whom I know personally, and under the suspicion that the bill I had from Howard was a counterfeit bill, I told him I would like to have him come down that afternoon on the next train, I wanted to see him on a matter of importance. Thompson was crossing the bridge then. He answered and said that he would be down on the next train. I went on and finished what correspondence I could, and about the noon hour, as usual, I went to town. I took with me the deposits for the day. I went to the bank at once and made my deposit, and went back into the cashier's private office and told him that I had a big proposition, that I was about to go into the gold-mine business. We had a conversation on the merits of the case. I went over the situation with him.

Q. Mr. Garrett, when was it that you began to suspect him? That there was something wrong about it?

A. The real suspicion began when he made reference to the Indian being out in the woods.

Here defendants by their counsel objected to the witness relating any further of the conversation then or subsequently occurring between him and the defendant Thompson with respect to the gold mine or its supposed product or the Indian in the woods, etc.

110 6th ex. Which motion was overruled by the court, and the witness directed to proceed; to which ruling of the court the defendants then and there duly excepted.

Witness proceeds: I have omitted just one item in answer as to what my services would be. I explained to him that inasmuch as the claim was all right, I could not leave my present business to take charge of the mine in Arizona. It was agreed between us then that if it would be agreeable to the other parties, that we would employ a time-keeper, book-keeper and general manager, to be paid from out of the expenses of the mine.

Q. Was there any consideration or suggestion made as to what part?

A. One-third interest.

Q. It was agreed that you were to employ a book-keeper?

A. Yes, sir. He was to work on a salary. Another point I will bring in right here. While writing these telegrams, there was an electric light over my desk of a little peculiar pattern, and he got down and looked at it and said, "What might that be?" I told him that was an electric light. He said, "What's that?" I told him, "It gives light here at night." He said, "How do you light it? Do you stick a match to it?" I told him no, that I turned a little peg and it lit up, and I turned another one and it went out. He said a boy down at the hotel showed him. He wanted to know if I could explain it. I told him no, that I was not sufficiently an electrician to explain it. I told him at home I would see him at the train. I went to the bank and talked with the cashier, and told him to go down to the depot and stand around and observe the man that I was talking to. When I went up he was buying his
111 ticket. I stood on the outside and as soon as he saw me he came and engaged in conversation again. He said the ticket cost so much and he gave him a bill for so much and asked me if he gave him the right change. I counted his money and told him his change was correct. I asked him what hotel he stopped at. He said the tavern right there. He said he had to get the tavern-keeper to write his name on the book, he didn't know what that was for. I told him that was customary. He wanted to know if he didn't charge him too much for his lodging. I told him no that was the regular charge. He said, "He asked me if I was a commercial man, I believe." I said, "What did you tell him?" "I said I didn't know what that was." I told him they gave drummers a special rate, "if you had told them you were a commercial man, I guess that would have been all right." And the conversation drifted along these lines. He then had me read this paper to him again, and he went over again the question of the cost of the mining outfit. And according to the understanding there I took out a letter which I had in my pocket, and on the back of it had him give me the cost of the mining outfit.

(Letter marked Exhibit "A" introduced, was a pencil memorandum by the witness of mining machinery, consisting of engines,

boilers, derricks, wagons, plows, picks, horses, harness, etc., of the aggregate value of twenty thousand ($20,000) dollars.)

He then asked me if that was not pretty good pay for my services. I told him yes. I began to question him further about the mine. He intimated in this conversation that the output of the mine would assay, with the machinery that we proposed to buy, a million dollars a year apiece. I then asked him about the general conditions
112 of the country, health, water, atmospheric conditions, nice country to live in; if there was any hunting and fishing. He said he was not fond of hunting, but that he hunted sometimes to get game for the camp, could shoot with a rifle, but never could shoot with a pistol. I asked him if he ever carried any weapons with him. He said no, that when they came to take the train they brought along the rifles in the wagon, but they sent the rifles back; that he was not a good shot with a pistol. I replied that I was a very poor hand also. We discussed other matters. While we were talking the cashier of the bank came forward, and I had seen him standing near. The cashier walked up and remarked, "Mr. Garrett, it is about the time of day that I take my drink. Won't you and your friend come and have a drink with me?" "Mr. Smith, let me introduce you to Mr. Thompson, of Arizona," I said. Thompson declined and I declined also. We continued our conversation then, and he said coming out East was mighty tiresome, that he didn't mind it for the first day or two, but he passed El Paso, and after he left there it was a long tiresome road; that he crossed a big river. I said, "The Mississippi?" He said yes, that he thought it was. He said there was a great big city there, and he had to lay over there. He counted up the time they had been away from Arizona. He said up to that day they had been away 12 days, that the Indian's leave of absence would be out in 20 days, and the Indian was getting very restless and uneasy, and wanted to go back to the reservation; that they would imprison him if he did not get back in time, and that it might be that the Indian would be so worried out and tired that we would just have to buy the Indian out and let him go back home. I asked him what he thought he would
113 take. Thought the Indian's share would be about $12,000.00. He then said that the Indian was mighty suspicious anyhow, and that at New Orleans they had run up against a man there; the fellow come up to him looking real nice; said he had on a white shirt, stiff collar, a great big diamond in cravat; said he was walking up and down the platform, and this fellow came up and spoke to him, and asked him where he was going. He told him he was going to Charlottesville, Va. He asked him if he knew anybody in Charlottesville. He told him no, that he was looking for a man named Andrew Garrett. He said, "Why I live in Charlottesville, and know him very well." They got to talking, and he said after talking a little with the fellow he told him he was in mighty hard luck, and that he and his brother, who had consumption, had, I think, started from Colorado to Arizona for his brother's health, but his brother died on the way, and he was on his way back to Char-

lottesville. He said, "I am in hard luck. I have not got any money in my pocket to buy my ticket. I wish you would loan me enough money to buy my ticket, etc., and when we get on the train I will pay you back." Well, he said the fellow seemed honest, had a good face, and said that his mother had always told him to be honest.

Said his mother, after her father's death, had grieved herself to death, that she kept a little Testament, and sometimes she would read it and cry, and told him he must not tell a lie, that if he told a lie he would go to hell, and that he didn't believe that a man like that would tell him anything but the truth, and so he pulled out his roll of money and started to count it out, and said when he did Gonez commenced to shake his head. But he knew that Gonez hadn't heard him. So he counted him out $300. Said the
114 fellow was mighty nice and they got on the train. The first station they got to he left his seat, and when he came back to look for the fellow he didn't see him, but he thought he would turn up directly. After going by two or three stations, he went to the man who had the buttons on his coat, and asked him where his friend was who had the corpse on the train. He said there was no corpse on the train. He told him yes, there was, for his friend had told him so, and he knew his friend would not lie to him. The conductor told him not to talk to every stranger that he come up with and he would better divide his money into two rolls so as not to show it all at the same time. He said he followed the conductor's advice, and since that time he carried some of his money in one bag and some in another. I told him that he must be pretty unused to the ways of the world, and I thought he needed some one to look after his affairs for him. While we were standing there talking about various things, he said while he was in Charlottesville the other day he saw a woman coming down the street riding on a little seat with two wheels made out of wire. Said "How in the name of the Lord did she sit on that?" "Why," I said, "didn't you ever see a bicycle?" Said, "No, what was that?" Said he saw something else, "saw a little car on the street about half as long as a railroad car, and it had a pole on top of it, and a man standing out in front of it, and it just went along with nothing pulling it and nothing pushing it." "Why, that is an electric car" I said. And he wanted me to explain to him what electricity was. I told him that was beyond me, that I could not do it. He explained to me then in this conversation at the shed, if Gonez agreed to the bargain, that when we came to Greensboro we would go out and see Gonez, and have a talk with him, and bore into the bricks and bring
115 them back to town and have them tested, and if the tests showed up all right, and if the Indian was still uneasy, why we would just buy the Indian out, and let him go on back. He was a great deal of trouble. His time was nearly out and he doubted whether we could get through with the work in Philadelphia and get through filing the claim in Washington in time for the Indian to get back.

I agreed to the estimate that he gave me of the value of the gold

as $36,000, and the cost of the machinery, $20,000, which would leave $16,000 to be divided between the Indian, myself and himself as pin-money. He intimated that if the Indian would not go to Philadelphia we would just buy him out, and he made some inquiries as to how much money I could raise. Up to this time he made no suggestions as to what the Indian could be bought out for. He afterwards said, "We will just buy the Indian's share and let him go home. It's worth $12,000. This beaded bag is the one he showed me, and contained two or three pieces of ore and a small bar of gold. The defendant sitting in the middle with glasses is Howard, the one who showed me the bag of gold; and his appearance now is different than it was then; then he had on a flannel shirt, good and substantial, but showed evidences of use, and he had a full beard. I saw him take the train at Weldon for Greensboro, and I awaited the arrival of Mr. Lewis, the gentleman whom I had 'phoned. I simply transacted my own business affairs. After a conference with Mr. Lewis, I drove out in the country late in the afternoon, just before dark, to the house of Mr. H. A. Mims. I reached there just about dark. It was raining. I called Mr. Mims to his front gate. I engaged Mr. Mims to come to Greensboro and confer with the authorities here.

Q. Did you give Mr. Mims any letter of instruction?

116 A. After I got home. I drove back home then, and addressed this letter myself to Mr. Patterson, accompanying it with a letter, a short note of introduction to Mr. Lewis. I wrote the letter myself, I addressed this letter to Mr. Patterson. Mr. Mims reached my house at about 8.30 or a quarter to nine. I wanted him to take the nine o'clock train. I handed him the letter and told him to read it for his own intelligence, and to confer with Mr. Patterson here, and the other authorities to whom he might introduce him. On the next morning I fulfilled my engagement in Norfolk. There is now a point I omitted to state. I sent a telegram to the chief of police at Richmond, I think that night. I wrote it in the afternoon, but don't think I sent it until that night. I received the telegram in Norfolk, Va., at the Monticello hotel about night from Thompson. I have the telegram that I received. Telegram reads: "Greensboro, N. C., March 21, 1901. Paul Garrett, Norfolk, Va., care of Monticello hotel. Gonez willing; come at once; will meet all trains. Frank Thompson."

Q. One other question, Mr. Garrett. What was the arrangement between you and Mr. Howard as to how much you should receive?

A. $25 a day and my expenses, and he handed me $10 on account.

Q. In response to the telegram what did you do?

A. In response to the telegram I came to Greensboro. Reached here next day at about noon. I do not know the exact hour by schedule time. I got off the train, looked out of the window before getting off, to see who was in sight, I saw Mr. Mims walking up and down the platform. I stepped off the train and walked

117 in another direction so as not to meet him face to face. In about a moment Howard was there, and told me he had

been waiting for all trains since morning; seemed to be very disappointed because I did not come earlier. I told him I came as early as possible, that I had to come by home to leave my wife, who was in Norfolk. We walked in the waiting-room, to look around and see if anybody was about there to listen. I asked him what his program was. He said he would drive right out and see Gonez, everything was all right he thought. Gonez was sorter uneasy, but he reckoned maybe he could fix things. I said "I have got to have some dinner." He said that was all right, where did I want to go. I told him I thought I would go to the McAdoo house, I had stopped there years ago. So we walked up the street together. Going up the street I had occasion to slip my handkerchief out of my pocket, and a bit of paper flew out and blew up the street, he chased it very actively, and caught it and examined it very carefully. I said, "That is nothing but a bit of paper." He showed me that he was thoroughly on the alert. I went into the hotel and registered. I turned to him and said "You will take dinner with me?" He said no, he had had dinner. I asked the clerk the dinner hour; he said one o'clock. It was then a few minutes after twelve. I said we would sit down here for a little talk. We sat down on the right side of the desk and began discussing matters generally. Mr. Mims walked in and took his seat right near opposite. Other people passed in. I paid no attention to Mr. Mims nor he to me. And we had quite a conversation. I had him recount again the mine. He had me count his money to see whether he had been cheated on the trip back here. I said to him, "I'm glad you have got some money. I am busted. I went to Norfolk and took along $75, expecting
118 to pay my expenses and the recording of the deed. I will have to borrow some money to pay my hotel bill." He said he had a plenty to get our tickets to Philadelphia, and if we got to Philadelphia and sold our bars we would have lots of money. We discussed many matters there. Among them I asked how far the Indian was, how far the camp was from town. He said about three miles out in the woods. I said I did not know there were any woods in Greensboro sufficiently close to hide an Indian. I said I would like to know where it is, for I have been down here a good many times, and I thought the country was all cleared up for two or three miles around here. He pointed his finger right out down the railroad, a little creek down there. I did not want to press the matter too far. I thought that might be some clue as to the direction we were going. He then said, he told me this at the shed, but he repeated it more fully this time; that when we bored the brick, we would get out plenty of borings, and when it was assayed and melted down we would have a nice little piece of gold to have my wife a ring made of. I said that certainly would be nice; she would appreciate it. About this time I told him that my wife was not sure where I was going, and he explained that we could go out to the woods and bore the brick and have them assayed; he said we would come back to town and get it done at a drug store. I didn't see how a drug store was going to assay it. But this is what he said, we would go to a drug store and get it assayed, and that if everything

was all right with the Indian we would go to Philadelphia that night, but if the Indian broke up the arrangement, or anything of the sort, we would buy the Indian's share and let him go on back. And then
he began questioning me about raising some money, whether
119 I could get any money, and how much I could raise. I told him he had struck me at a mighty bad time. I told him I had just bought a large piece of property which cost in the neighborhood of $40,000. He wanted to know if I paid all cash. I told him no, that was the deed that I had recorded; I had to pay about $35 stamps, and $35 for recording. They charge $1 a thousand for recording. It took $70 I remember to complete the deed. He wanted to know if I could not raise money on that land. I told him that if the necessity arose I could raise a little money, I reckoned. The bricks had not been weighed at that time; he told me we would go out there and if the Indian was cranky, we would just buy him out. I would have to raise the money, but that I would be recompensed when I got to Philadelphia. I told him that on a push I reckoned I could raise a little money. He wanted to know how. I told him it would require some time. I would have to go to the bank and get identification. He wanted to know what banks were. I told him it was too much of a subject to go into fully. He absolutely confessed ignorance of banks. I then remarked that I had to write to my wife. I went into the writing-room and sat down at the desk, where I could keep him in view. At the McAdoo house Mr. Mims walked in. I caught a chance when Thompson was not looking at me, and asked Mims to go downstairs. There was another man in the writing-room; didn't know who it was. I handed Mims a little slip of paper, some further instructions that I had jotted down on the train. I arranged for Mr. Patterson, the revenue officer, to come to dinner with me. I finished my letter, went and bought a stamp at the cigar stand, and asked the clerk, in a tone of voice that Thompson could hear, for reassurance when the next train went to
Weldon, that I was anxious for my wife to get that letter. He
120 said while I was at dinner he would get the horse and have a buggy ready when I finished dinner. The intimation was that we would make arrangements with the Indian; there was no assurance that he would back out; but there was a strong intimation that the Indian was very restless and was going to want to go back. There was a broad hint that we would have to pay him a one-third interest, but we might get out for less. I went up to dinner. I asked him if he would take dinner. He said no, he would go and get the horse and buggy, and have it ready. Mr. Patterson and I got to the table. I asked him to look around the room and see if he knew everybody there. He said he thought we were safe. We went over the plans then; I told him what had developed, and stated to him that I wished protection. I located practically the point, just picked up the question and made further developments. I think it is proper for me to say here that Mr. Patterson left me in doubt at that time, until just before we left he gave me the assurance that he would go along. Mr. Patterson left the table before I did. I waited a little while. When I went down Mr. Mims was in

the corridor and the buggy was standing at the door, held by Thompson (as I knew him then). He was standing on the ground. I passed by Mr. Mims, and he remarked that they had gotten the papers. I loitered around the lobby a few minutes and then went out and got into the buggy. I said, "You have got no buggy robe." He said we didn't need any. I said, "March weather is very changeable; I would rather have a buggy robe, and if it will be no inconvenience I would like to have you drive up to the stable and get a buggy robe." We drove up to the stable and got tangled up in a lot of buggies, and it took some two or three minutes to
121 get out. We drove out across the railroad. Went out southwest, I believe it is. We drove along pretty nicely. I complimented him on the way he held his reins. He said he had been accustomed to driving a team of four horses, and he went again back to the question of banks, and asked me where I kept my money. I told him I didn't keep all my eggs in one basket. He said he didn't understand. I said, "Yes, you do," He said, "You mean you keep some in one bank, and some in another?" I told him that was about the size of it. "Do you keep any money in Weldon?" I said, a little. "Do you keep some in Norfolk?" I said, perhaps so. I was non-committal about the money. And again he referred to the fact that he didn't know how we would find the Indian, that when he left him that morning he seemed to be in a good humor. They were mighty suspicious, and we might find him all upset, and if so, we would just buy him out and let him go on back; he was a trouble anyhow, and in Philadelphia he didn't know what on earth he would do with him in a city. I consented to what he said. We drove along at a nice easy gait. At about two miles from town, he said we were approaching the place and we would drive a little slow. I told him that it was agreeable to me, that I was not in any hurry. We drove up right behind a wagon; I think there was a man and little boy in the wagon; they were driving in a little dog trot. We followed on for about half a mile, I think. He didn't want to pass them, they might see us. All right then, drive along behind them. Don't make any difference to me. Right at the top of the hill the wagon stopped and the man got out to get a drink of water. He stopped his horse and said, "Now I don't know what to do. If I drive on he'll see me." I said, "If you do not want to pass him, get out and get a drink of water." He got out and he looked down the road and
122 said, "Somebody is watching us." "What makes you think that?" About that time a buggy drove by. I thought I recognized Mr. Patterson. I didn't know Mr. Jordan. I just got a glimpse of them. It was Sheriff Jordan and Mr. Patterson. They drove right on ahead. Well, he watched those two men on horseback. He said, "I don't like it, it looks suspicious." I said, "I guess it is just two fellows that have been downtown to get a little boozy, or possibly there has something broken about the harness." He went and got a drink of water and pulled out his handkerchief and said, "I don't like the looks of those fellows, do you?" I said, "What's the matter?" "Nothing in the world, but a couple of fel-

lows been downtown and got drunk, or maybe something is broken. If you want to, we'll go back to town." He got in the buggy, drove about two steps, pulled up his horse short, turned around and looked. He said, "I don't like that a bit." I said, "What's the matter? Man, you are looking mighty suspicious to me." He said they looked suspicious. I said, "Those fellows have not got any such notion. Just go right along." "All right," he said; and drove on three or four more steps and stopped. I said, "The next time you stop, I am going to take the horse and buggy and go back to town. If there is anything about this transaction that is not straightforward I am out of it. If everything is all right you may go along with the transaction. What if those two men do come upon us, why we will have them go on about their own business." He drove on to the foot of the hill. He drove very rapidly. I never looked back. We went over the top of the hill and down into the bottom. He said we would stop there. I noticed as we crossed the road another buggy track; I made no remark. We got out and he began to tie the horse. I commenced unhitching
123 my side of the horse. He said, "Don't unhitch." I said, "Yes, it is my rule always to unhitch with a strange horse." Said he didn't want to unhitch. "It is the safest plan to unhitch," I said. Said he didn't want to unhitch. So I hitched up again. After that we started off through the woods, he walking ahead. He was taking the lead. I talked to him in as loud a voice as I could, without seeming intentionally loud. Walking throught the leaves made a good deal of noise. I suppose we walked 100 or 125 yards almost in a straight direction; he then began turning around. At last I said, "I believe you are lost out here in the woods." He said, "Oh! no we are most there." He had doubled back in the meantime. We approached then a place that was a little marshy and woods and briars, and you could not see far through it; I was behind him about three steps, he held up his hand, and looking at me with rather a startled face, said, "Look! there is the Indian!" And in a loud voice he said (here the witness mimicked the peculiar language they used as best he could). There was a repetition of the noise in the bushes. The man in the bushes repeated practically the same thing. He looked around at me and said, "That's him." I said, "Yes," and commenced looking through the bushes. They kept up that conversation for I suppose ten minutes, with various inflections of the voice. I naturally got a little interested to see who the other man was, and I suppose I was a little too eager in peeping through the bushes. The Indian's voice I suppose got quite angry. He told me to stand up straight. I straightened back, put my hat on the back of my head, and squared up. I could see the black object in there. I saw something moving, and could see the various maneuvers. He says, "He likes that better." I said, "All right." They conversed again for several minutes, and again the Indian's
124 voice got even more antagonistic than before. He shook the bushes and I could almost imagine I saw a tomahawk waving around in there. I said, "What's the matter with him?" He said, "He's not satisfied. You know Indians are mighty suspi-

cious." I said, "Well, what will satisfy him?" I said, "You tell him I'm Andrew Garrett's brother." He said, "That's a good idea." So he had another conversation with him, and the Indian's voice got very soothing and complacent. It dropped its tone several degrees. He said, "That fixes things all right. I will go and get the bricks. I will go and get the bar." I said, "You had better let me go with you." "No," he said, "you stand right still. The Indian don't like white men anyhow." So he approached the Indian, and they kept up this conversation between them pretty steadily, and he went to pick up the bricks, the Indian again remonstrating quite distinctly, he sounded like a remonstrant, and he set them down and explained it to him, laid it off with his hands, etc., and the Indian gave his consent apparently, and he started off with it. He got about half way and the Indian again raised a remonstrance and he sat down on the ground and explained to the Indian. I said, "You had better let me help you." I had a little curiosity to get a little closer view of the Indian. He said, "You stand right still." I said, "All right," so he brought them forward; in one hand he had a brace, and in the other he had a pair of spring balances. And when he came up to where I was, he said, "Now, we'll weigh them." I said, "All right." They were in some oilcloth wrappers, with a heavy strap around them.

(Here counsel for defendant objected to the State offering in evidence the package or the substance claimed to be in the package; or substance shown or exhibited to the witness on the occasion when he accompanied and was with the two defendants Thompson and Daley in the woods near Greensboro, upon the ground of identification of the object or substance now offered as being the same, and for the further reason that the object as described by the testimony of witness was one securely done up and bound by a shawl strap, and the object now before the witness is not so done up and is not bound by a shawl strap, and further because the package and contents are not relevant or competent.)

125

Before ruling upon the objection, the witness was allowed by the court to further describe and identify the package; when he said that it was black, was wrapped and tied with a leather shawl strap, and that he saw it unwrapped at the time; that it is the same package and——

7th excep. 7th ex. The objection was then overruled by the court, to which defendants then and there excepted.

The two packages and contents were then offered in evidence, to which proffer the defendants, by their counsel, objected because neither the packages nor contents *was* of the *res gestæ*, *was* no part of the representation and *was* not a token of a public character, or of such as was calculated to, intended for, or capable of deceiving, and because irrelevant and immaterial.

8th excep. 8th ex. Which objection was overruled by the court, and defendants, by their counsel, then and there excepted.

The witness Garrett, then said the package was unwrapped after weighing by spring balances. He came up with a brace in one hand and a spring balance in the other, and as he reached down to get the brick, he said, "Now we weigh him." I said, "All right." So he took the balances, and his first effort was to lift it up in front, but it was more than his grip permitted; so he stood almost astride
126 of it, and he could not carry it from the ground much. So I had to get right down on the ground to see the figures, and I took my pencil and followed the dots, and said, "95, 96 pounds." He said, "Let's try him again," and with that he pulled it almost up again, and I counted, "93, 94, 95, 96 pounds." Then he said, "We will weigh the other one." And then he got in the correct position, and we weighed the other one, which weighed, as I remember, 95 pounds. While I was figuring he was down on the ground unwrapping the package, took off the oilcloth, then the flannel. The packages before me are the identical ones which he showed me on this occasion. I notice the same mark now upon one that I noticed then. After weighing both of them, he then unwrapped one, and he looked at it, and I went right down on the ground and said, "Is that thing gold?" I looked up at him, and he said, "Pure gold, 22 karat fine." I said, "My God, it's a pretty thing as I ever saw in my life." He said, "Ain't it pretty?" And just in that attitude, as he sat there, he was putting his bit into the brick, and said, "Now we bore him." I reached out my hand, and I heard a voice in the woods some little distance say, "Throw up your hands." The miner Thompson heard something apparently and with the brace in his left hand—whether he dropped the brace or not, I do not know, but with his right hand he went into his coat pocket; I sprang at him and said, "What's the matter?" He asked me, "Did you hear something?" I said, "No, not a thing," and he said, "I thought I did." I said, "I heard nothing." I said, "Give me the brace now and let's bore this and get out of here; there may be somebody prowling around here," and so he took his hand out of his pocket. I got astride of the brick again, the one on the ground. I did not have the brace and bit in my hand,
127 but just at this point I held my hand out for the brace; then a voice very much more distinct and penetrating says, "If you don't drop that I will put a ball through you." That was a voice back in the woods. The Indian in the meantime was keeping up quite a chatter. I didn't pay any attention to the Indian. As soon as he heard that remark, he again sprang up and went into his pocket again. As soon as he did I sprang at him and caught his coat and held it down so he could not spring his hand out. I said, "My God Almighty there's one behind every tree in these woods! Man, you have played a mean trick on me! You have fooled me away from home up here, where we are surrounded by officers. He said, "I didn't do it." About that time a man ran up and came around behind me, and laid his hand upon the man and began feeling in his pockets, and all up to his face; seeming to be satisfied with his search, quick as thought he turned around to me and said, "What's your name?" I said, "My name is Garrett." "What are

you doing up here anyhow?" He said, "That makes no difference, I am an officer, and I command you to take charge of this man." "Me take charge of him?" "Yes." "Suppose he tries to run away from me?" He says, "If he moves a finger, shoot him." That was Mr. Patterson.

9th ex. (Counsel for defendants object to any further evidence of the acts or declarations or conduct of the de-
9th excep. fendants being detailed by witness, after the approach of Officer Patterson, who then and there put the defendant Thompson under arrest. Objection overruled. Exception.)

At this point I realized that the officer had not disarmed the man, and that he evidently was armed, so I felt that it was prudent to let him see that I was protected, so I brought my rifle into evi-
128 dence. I held him there, and in a few moments another officer approached. Another man came up and began to search him, getting everything out of his pockets. Finally he took out a pistol from his breast pocket where his hand had been. As he disarmed him I released my hold, the officer had him under his gun; another one had a handcuff on him.

10th ex. Here defendants, through their counsel, moved to strike out the evidence just detailed by the witness,
10th excep. because it relates to facts and circumstances occurring subsequent to the termination of the alleged conspiracy and is not of the *res gestæ*, which motion was denied by the court, and defendants then and there duly excepted.

At this time I do not know if the Indian had been arrested. I saw an object; I could not identify the object. I saw it moving around. I recognized a lot of black hair.

The hair which was produced and shown to the witness was long and black and affixed to a false-face resembling that of an Indian, which the witness identified as being that worn by the defendant Daley at the time of his arrest.

Mr. Patterson took off the headgear and also a beaded buckskin jacket from Mr. Daley.

11th ex. Here counsel for defendants moved to strike out all the evidence given by witness with respect to the
11th excep. explanation and identity of the Indian garb, alleged to have been worn by the defendant Daley, and taken off of him at the time of his arrest, as detailed by witness. Motion denied. Defendants except.

I saw Mr. Daniels make a move to take something from the miner. Mr. Daniels took a card, I think from under the miner's foot. Some words passed then.

12th excep. 12th ex. Defendants' counsel here moves to strike out the evidence with respect to the
129 card, as detailed by witness. Motion denied. Defendants except.

The card read Henry D. Hawley, Hotel Guilford; that is one of the defendants. The two defendants, Thompson and Daley, were then arrested and brought to town.

"My purpose and intention after the interview with Thompson in which my suspicion was aroused was to come to Greensboro, and if the proposition which he was making me was a legitimate one, and truthful, to trade with him; but if it developed that the whole scheme was a fraud, and their purpose was to cheat and defraud me, I proposed to turn them over to the legal authorities, and have them punished."

Being cross-examined by Mr. Gilmore, the witness said:

Paul Garrett cross-exam.

That he is 38 years old, six feet tall, weighs 205 pounds; of common-school education; been engaged in the manufacture of wine since he was fourteen, and since 1890 has been at the head of the concern; that the annual business ranges from $100,000 to $150,000; that he employs about forty people; that the moment he first met defendant Thompson, he was dictating to his stenographer, and that by invitation Thompson waited until he was through.

It puzzled me to know how he got into my office. I spoke to him about five minutes, and asked him what his business was, and he said he wished to see me privately. I don't recall what I said to him, but he insisted on seeing me privately. Do not remember his words nor mine to him, but we went through the shipping-room and on to the outside of the building, a distance from my office of 60 to 75 feet.

Up to this time he had said nothing as to what his mission
130 was. The first thing he then asked me, if I had a brother Andrew Garrett, and I told him no. He said he was sorry, that he was looking for Andrew Garrett's brother. As we talked I looked straight at him. I told him I had no brother; never had but one, and he died in infancy. He said that Andrew and he had been partners in Arizona, and that about four years ago Andrew had come back to his rich aunt, living in Charlottesville; that she had written him a letter, and he had come back to look after her property; and before he had left he and Andrew made a bargain that if either one of them ever ran upon anything (I cannot give his exact expression, I will do my best at it) that they would let the other know. That he had come to look for Andrew, but found that Andrew was dead, and his aunt had gone away; and at Charlottesville he was told that there was a man at Weldon named P. Garrett; that he knew Andrew had a brother named Peter, and he thought it was him, and he had come to look and see if it was so, and he was mighty sorry that I was not Andrew's brother. I told him no, that my name was not Peter, that it was Paul, and as I could not serve him, I was busy. He said, "Looked like nobody didn't want to talk to him anyhow; he warn't after no money; had plenty of money;" and with that he exhibited his roll of money. A little purse with a lot of money. It was a leather purse with a number of large bills, some in denominations of $100, and there seemed to be several of them. He made the impression on me that he was not after money. He said he was not after money. He then took up the question of being a poor ignorant man; that he could not write

nor read nor figure. He then said he was looking for Andrew's brother to take Andrew's place—to take Andrew's interest; that he and Andrew had bargained that if he was ever rich he would take
131 him in. He wanted Andrew's brother to look after the business of the enterprise because he (Thompson) was ignorant. I told him I did not see what connection I had with it; that I was not Andrew's brother. Up to this time I had not become interested in the matter. He represented that he was mighty sorry; he didn't know what he would do; that he could not find Andrew's brother nor Andrew, I told him I didn't know what he would do either. He then said that he had met a man on the train who told him that I was a good man at figures and honest. I told him I tried to be.

From what he said I gained the impression that I might take Andrew's brother's place, and I told him that if it came to a question of business consideration, I was open to any business proposition he might see fit to make. He stated that they wanted some good man; that the job was going to somebody, and that if I didn't take it somebody else would. He said he needed a man that could read, write and figure and was honest.

Up to this time he had no opportunity to know that I was such a person; he said he wanted such a party. I asked him what there was in it, and that he might ascertain regarding my competency and honesty from my partners and the business men of the community. He then repeated substantially what he had said about Andrew's brother, and that he had found this man before in Arizona, and that he was on his way east for the specific purpose of purchasing mining machinery and taking out a patent on this mine; that he needed somebody to go with him to Philadelphia, and he thought that I would answer; he explained they had previously worked the mine with Indians—six squaws, no machinery, that it was machinery he wanted to arrange for; that he had found the mine
132 about two years ago; that the equipment he had operating in the mine was not sufficient, that he wanted to get machinery; that he had none; he then practically enumerated all the machinery he wanted; spoke entirely familiar of it; for that kind of stuff; I told him I would have to rely upon him as to the place where and the equipment to be bought; he then made me a proposition as to my services in connection with the enterprise; he offered me one-third (⅓) interest in everything he had, mentioned the two bars of gold; I told him that there was nothing material in that, and that ordinarily I got something for my services, and that I should expect my expenses paid and a remuneration of $25 per day. We came to the agreement that I should have my expenses and $25 per day; that was our contract, with the one-third (⅓) interest. I was only to give my services as consideration; the $25 per day was to cover the time that I was absent from my business, going to Philadelphia and Washington, or to Arizona, and the one-third (⅓) interest on the confirmation of the Indian; so far as Thompson was concerned we made the agreement. The $25 per day and expenses was to apply only to the time that I was neglecting my own business for the other, absence from home caused by the work pertaining to the

gold mine and the purchase of machinery. The business management was all I was to give for the $25 per day, and the one-third interest; I don't consider I was receiving a double compensation; it was the compensation he and I agreed to. He then paid me ten ($10) dollars on account of expenses in good money; I suspicioned it as bad money at the time he gave it to me, but took it right down to Mr. Smith, cashier of the bank of Weldon, and he said it was good money.

Thompson first called on me about 9 o'clock, a. m.; was
133 there about two hours, when he left, walking back to the station. As he departed to return to the depot, I called the attention of Mr. Cole, my book-keeper, and another employé in the office, to look out of the window, saying, "There goes a gold-brick man." We all three observed him a couple of minutes, all took a good look at him. I suspected as soon as he mentioned the Indian and the gold brick hidden up there in the woods that he was a gold-brick man; that was before he paid me the ten ($10) dollars. I had suspected that this transaction was fraudulent before he paid me the ten ($10) dollars. I have never returned it. I did not return it after I knew it was good money and suspected the transaction was fraudulent, because I expected to go to Greensboro. I retained it to defray expenses to watch developments in the gold-mine scheme. It was mighty pretty, and I thought possibly there might be something in it. I may have been something of a phantom-chaser in this transaction. I went down to the depot to the 11.30, when I showed Mr. Smith the ten ($10) dollar bill, and later met Mr. Thompson at the depot shed in Weldon, where he was waiting to take the train, and after suspecting his story I had a conversation with him, we went over the ground practically again and discussed quite a number of things; we made arrangements regarding the machinery and figured it out, I professing still to be his partner, meaning to carry out my part if figures had truly represented facts. I proceeded further to honestly carry out my part of the contract by making arrangements to come to Greensboro; by arranging my business so I could be absent from home a good while; left instructions with my assistant as to what should be done during my absence if I should be gone over two or three days,
and made those preparations which I ordinarily make
134 when being called from home on business; and made such arrangements in an honest endeavor to carry out my part of the contract. Had a conversation with Mr. Smith regarding it; introduced Mr. Smith to Thompson at the shed. While talking with Thompson, I went into a saloon for a pencil to figure up the machinery, returned and waited with him until he left on the train. There was possibly an exhibit between him and me of the telegrams I had written; possibly I asked him to show me which one meant for me to come, and which one not. My memory is faulty at times. I talked with him twenty or thirty minutes at the shed; saw him take the train and after he had, I hung around the shed for a while and went home, and proceeded to attend to my business affairs until the arrival of Mr. Lewis, whom I had telephoned, after Thompson

left my office and before I went to the depot. I said to him over the 'phone that I had a matter of importance to consider with him. He arrived about 3.30 p. m. I explained the matter to him. That afternoon I wrote a telegram to the chief of police at Richmond, Va., that I had a gold-brick gang spotted, and wanted them to send me a detective to the Monticello hotel, Norfolk, Va. This is in the afternoon of the 20th day of March, 1901, that I have reference to. The same day I first saw Thompson. Up to this day I had not seen or heard of any of the other defendants in this case, except the Indian. Mr. Thompson told me in the first instance that he had an Indian associate; that together they were interested in this transaction.

I went to Norfolk the morning of the 21st, leaving about 4 o'clock in the morning; bought a piece of property approximately of the value of $40,000; I paid $1,000 cash and up to that time
135 $1,250 note, and made other notes of $1,250, each payable monthly; don't remember the exact amount of unpaid purchase-money; but think it cost in the aggregate about $70 for revenue stamps on the deed and mortgage. When I left home I took $75 with me. I left Norfolk for Greensboro by way of Weldon, traveling on mileage, and including the sleeper and hotel bill I had to pay at Raleigh, I think it would have exceeded ten ($10) dollars. I drove out to the house of Mr. Mims on the evening of March 20th, 1901, and asked him to come to my office, which he did, and I wrote a letter on the typewritter, single-spaced over two pages long, addressed to Mr. Patterson; starting with an introduction of Mr. Mims, accompanied by a letter of introduction from Mr. Lewis, and requesting Mr. Patterson's assistance in the apprehension of certain men, whom I had reason to believe were criminals, saying I that day had a call from a man, describing him and giving his name, and repeating nearly as one can in a typewritten letter some of the characteristic remarks that he had made, and as nearly as possible in the language he gave, describing him so that he could know him. I then outlined to him the leading impression that the man had left on my mind by his conversation, including the impression of the many possibilities that there might be something in it, but that the preponderance of the evidence made me believe he was a man whom it was my duty as a citizen to apprehend and bring to the bar of justice, and I asked his assistance in doing this. The greater part of the letter was devoted to a description of the conversation between us, and the grogramme and plan outlined by Miner Thompson; in order that Mr. Patterson's judgment might be used with some discretion. I told Mr. Patterson that the letter as written, would no doubt sound pretty fishy; that I placed myself entirely in his hands for him to
136 protect me, if the following out of these plans developed into danger and that in the event of any emergency or necessity for action that I hoped he would not stand for a moment, but shoot straight to the mark, and be sure to hit the right man. I mentioned my suspicion that possibly there was some reward for the Withers gang, and that in such event I proposed to deal liberally and not be hoggish about the matter. But I impressed on him that the prime

consideration was not reward, but was to carry out what I thought to be my duty as a citizen, and to bring these men to justice if it should develop that they were crooked. I meant by liberal, that I would not claim all the reward, meaning to divide such reward as might be obtained with Patterson and others; that I could not give to myself all the credit of any remuneration that might come. I think I said that the reward in the Withers case was very large, my impression at that time was, it was for $20,000. I did not mention any sum in my letter.

I signed, folded and gave the letter to Mr. Mims with $20 or $25 for expenses. I directed that he read the letter for his own guidance, and deliver it to Mr. Patterson, and to be governed by his advice. My conversation with Mr. Mims before his departure was about five minutes. I heard from Mr. Mims by telegraph at Norfolk the next day, which telegram read: "Men are located; arrangements complete." Arrangements had reference to my protection. I thought I was up against a pretty hard proposition; I didn't want to be carried out into the woods and to be butchered; I went up against the proposition with suspicion that it was crooked before I accepted the ten-dollar bill. I thought when I called my stenographer's and clerk's attention to look out of the window some 70 feet away and observe a gold-brick man, that he was a fraud; and
137 thought it pretty strong, and was under that impression when I took the ten-dollar bill down to the bank and had it examined, and had the same impression when I sent the telegram to the police of Virginia, the next day. The protection I thought Mr. Mims would arrange for me at Greensboro, was fire-arms. Upon my arrival at Greensboro, I met Mr. Mims and Mr. Patterson before starting with Thompson to the woods where the supposed Indian was. Patterson told me he had communicated with the sheriff, but no papers had been issued. It seems that the magistrate thought it was too thin a tale. Patterson told me this. Mr. Patterson told me that he had turned my letter to him over to the sheriff, and that there had been considerable consultation over it, and that the sheriff had taken the advice of attorneys, and that the matter had at that time been submitted to the justice. I talked with Mr. Patterson pretty plainly for about thirty minutes before leaving for the woods with Thompson.

Upon my arrival at Greensboro, Mr. Thompson met me at the depot and he walked with me up to the McAdoo house; sat down with me in the corridor; had quite a long talk, going over the ordinary discussion. He wanted to know where I had been and what I had done; I asked him which way we were going, how long it was going to take to get there; which direction it was from there; if there was woods around here sufficiently thick for an Indian camp; and he told me that we would get enough borings from that brick, after it was melted down, to make a nice ring for my wife, and one thing and another; he said that at the time, and he said the same thing at Weldon; said I could use the borings for that purpose; he was going to give them to me. We talked of the ex-

pense of the trip to Philadelphia and Washington, and as to
138 whether he had money enough to defray the expense. He handed me his money to count and asked if that was sufficient to take the trip contemplated to Philadelphia and Washington; I told him it was.

It was my intention during that conversation to take the train and go to Philadelphia; but that was not altogether my reason for wanting to know if he had sufficient money to defray the expense; I told him at that time he would have to loan me something to pay my hotel bill before we could leave; I asked him for no specified sum; he did not refuse to let me have any part or all of it. I had some accrued compensation up to that time. I didn't talk with him as to an advance on account of compensation for time already devoted to the scheme; I didn't make the effort, because I didn't want to pull his leg too hard at once, thought it would create suspicion; had not at all changed my mind. Have not made any demands on him for money at all. I have entered a suit here, don't remember the amount; I think I swore to an affidavit in the suit brought against these defendants, but cannot recollect positively; that is my best memory in that instance. Referring back to the instance of bringing suit, I cannot recollect the amount I sued for; might get it by reference to the papers, but not to my mind; I think it was a "claim and delivery" suit for breach of contract. I was trying to recover a certain amount of money that they had in their possession. The defendants had a contract that I was trying to recover; I had not made any demands on them for the performance of the contract. My memory refreshed by my signature to the affidavit before John J. Nelson, clerk of the superior court, on the 23rd day of March, 1901, that I there swore that J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Haw-
139 ley were indebted to me in the sum of $2,000. I put that as a light estimate on the mine, one-third interest in which I was suing them for—one-third interest in this gold-mining property. I attached everything in sight that belonged to them; the suit is still pending. I claim they are indebted to me. I rest upon the paper—$2,000. Thompson represented to me that there were two gold bars at Greensboro, worth $36,000; two others in Arizona, worth about $48,000, and a gold mine in Arizona worth millions. I thought my claim was very reasonable. I had a third interest. I had never met or talked with defendant Hawley before I brought the civil suit; I involved him because they all seemed to be in the gang. I involved Daley because I had a telegram with his assent to the contract. It was the telegram Thompson sent me, "Gonez willing." He was to confer with him, and wire me if he was willing. That telegram said nothing about Mr. Hawley. I involved Mr. Hawley in that suit because I was playing for all in sight. That civil suit is still pending as I understand, and I understand that property of the defendants was seized under the process in that suit; but I do not know what the property seized is, and don't know as a matter of evidence what property was seized under that process. I got possession of the newspaper clipping I have read from and

offered in evidence from Mr. Brooks or Mr. King, or some of them. After the attachment I retained Messrs. King and Kimball to bring this civil suit for $2,000 and advised with them about it. Immediately after coming from the woods I drove to their office and retained them to appear in this case. They are the first lawyers that I saw in connection with this matter. I did not know when I first went to their office who the State solicitor was. I did not find out who the State
140 solicitor was until after supper, when I was introduced to Mr. Brooks as solicitor. This civil suit was entered at 2 o'clock in the night. I do not know who went on the attachment bond in the civil suit. I have no recollection. My recollection is that Mr. Mims went on the bond; I don't remember requesting any one else. The papers were ordered in Messrs. King & Kimball's office after 12 o'clock at night. I heard the examination of the defendants before magistrate, which concluded about midnight. I went to the woods the same day I arrived at Greensboro, and went to the office of Messrs. King & Kimball on the same day and sued out the attachment for $2,000 on the night of the same day; I was willing to get $2,000 if I could. When I arrived at the woods Thompson brought out two packages, both done up in flannel oilcloth, and bound with a shawl strap, and we went through the process of weighing them; remember weighing each one of them, down on my all-fours with pencil and paper in my hand to set down the weight. I stood up between their weighing sufficiently long for him to change the scales from one package to the other. It is not true that while weighing the second we heard a cry "Hold up your hands, or I will shoot." Mr. Patterson came up toward Thompson and I stood, caught Thompson by the arm and said, "You are under arrest;" I then said to Thompson, "This is a mean trick you have played on me to get me here away from home in a strange land, and get me arrested." Patterson then turned to me and said, "What's your name?" I said, "My name is Garrett." "What are you doing out here? You got nothing to do with this." I was scheming, I was matching my wit against his. He says, "That makes no difference, I am an officer and I command you to take charge of him." At this time Thompson had put his hand in his pocket, as if to draw a weapon; he had
141 not drawn it. This was after the cry of some one, "Hold up your hands, or I will shoot you." I pulled a gun I had in my right outside coat pocket. But I had that gun out before Mr. Patterson came there, a few minutes I suppose, when I was holding out my hand for the last boring. I am right-handed; don't think I could have missed him that close. I tried to keep up with Thompson's lies. The only difference was, he lied straight to taw, I tried to serve my purpose better. Don't think I had to lie to him. I took the gun in my right hand out of my pocket and held it a little back of me, and the officer said If you don't drop that gun I will put a hole through you. Thompson said, "Officers!" I grabbed him, and said, "For God's sake, don't pull a gun they will shoot us to death." It was a Colt's revolver, nickel-plated. When I made this remark to Thompson the gun was in my hand behind me. I brought it into evidence. Patterson had not robbed him of his gun; I

thought there was one there, but I had not seen it up to this time. I saw Deputy Sheriff Weatherly take a gun from Thompson's right inner pocket of the lapel of his coat. I had my gun in my hand at that time; had had it there for awhile. I do not remember that I was frightened as we approached the woods; I remember a wagon passing us on the way, and stopped for a drink. Thompson acted afraid, and I insisted that there was nothing to be afraid of that I was going on. I invited him more than once to proceed on. At the time Patterson came up, he had the brace in his left hand; his right hand in the right lapel of his coat. I was mistaken when I heretofore said that his right hand was under the left lapel of his coat. I don't think that Mr. Weatherly took a gun from his right-hand pants pocket. It was taken on Mr. Weatherly's search;
142 Mr. Patterson made a brief search around his hips, but did not get as high as his coat pockets.

I wrote the attorney general of Virginia to know the reward offered for the Withers gang. This was after I returned home from Greensboro. If there had been a reward I would not have hesitated to accept it. It was my purpose to divide the reward with those that assisted me. I felt that it was too delicate a matter to approach gentlemen with, to offer them a fee for services of that nature.

At the time of Thompson's arrest in the woods he asked me a number of questions, but I only replied to the last one, knowing that he would have an opportunity to ask the same in the court-house. It is not my recollection that he there said to me that he had not asked me for any money, or that I replied to him, "No he had not, but that I had ten dollars of his money and would get more," that such in substance was not said at that time. Mr. Thompson said at the McAdoo house that he would pay all expenses.

Q. Don't you know at that time you told him you had no money with you?

A. I told him I would have to borrow some money.

Q. Didn't you say to him that you would have to borrow some from him?

A. I think I did.

Q. And that was before you started to the woods?

A. Yes.

Q. Were you telling the truth?

A. I think I had a little. I didn't want to be taken up. I explained to him at the McAdoo house when I counted some $340 of his money that I had become indebted at Norfolk, Va., and the character of the indebtedness. I have retained Messrs. King
143 & Kimball to assist in this prosecution; so retained them the evening of the arrest. Before I knew that the solicitor was in town.

Q. Do you regard yourself responsible for this prosecution?

A. Not at all. I explained to Mr. King that I was in the hands of this people, that I had carried this thing as far as I could.

Q. Have you said to any one what you would do with the money realized from this civil suit for $2,000?

A. I think that is the only time I have made any direct statement. I proposed to get some little souvenirs for my friends who had assisted me.

Q. Isn't it a fact that at the time you pulled your gun down and levelled it on the defendant Thompson in this case, that you had no positive information from any source that Mr. Thompson had told you an untruth?

A. I had reasonable ground to believe that it was an untruth. I had no positive knowledge, but thought it was a fake.

Q. Relying on that same judgment of yours, didn't it dictate to you the same thing when Howard was talking to you about this matter in your office?

A. Not so thoroughly.

Q. As he departed from your office and at the time that you called the attention of your stenographer and clerk to the appearance of Thompson, did that same judgment of yours convince you that this was a fraud at a later time?

A. Pretty much so.

Q. And the same day you took that $10 bill to the bank?

144 A. Yes.

Q. And the same day you telegraphed to the chief of police at Richmond, Va.?

A. Yes. The preponderance of the evidence was in favor of the fraud.

Redirect exam. On redirect examination witness identified two satchels found in the woods at the time of the arrest, and the same was offered in evidence.

The State, to further prove the case, produced and had sworn J. F. JORDAN, who testified in substance as follows:

J. F. Jordan, direct exam. My name is J. F. Jordan; am sheriff of Guilford county; remember the occasion of the arrest of Howard, Daley and Hawley. My first information of the matter was on the 22nd day of March, about 12 o'clock, when Mr. A. C. Patterson came into my office and gave me a letter which I read. I went to the telegraph office and saw Thompson about 1.15 p. m., on Thursday, the day preceding the arrest; he was sending a telegram when I went into the office. He had on a flannel shirt which looked as though worn for some time, and a kind of brown suit, and rather full beard, rather ragged; and a crushed hat, light-colored. I heard the operator read the telegram over to him, which was addressed Paul Garrett, Monticello hotel, Norfolk, Va., and read, "Gonez willing; come tomorrow." It bore a cross-mark on it in blue pencil. Thompson then came out of the telegraph office and went into the hotel Guilford; left there ten minutes later. I next saw defendant Hawley at the hotel Guilford with Thompson; he went out at the same time. They had at that time a little conversation and then separated, Thompson going down the street and Hawley going back to the hotel. I came back

to my office and remained a little while, and then I went
145 home to dinner and came back and spent most of the afternoon driving up and down the main street here, stopping now and then loitering about. I permitted Mr. Weatherly and Mr. Mims to aid me in tracking these men. After Thompson and Gonez left the hotel I saw him and Gonez conferring together that afternoon once or twice before night upon the street near the McAdoo house, the first time on the opposite side of the street. I saw no further confidence between the defendants until the next morning. The next morning I saw Thompson, Hawley and Gonez in conversation three or four times before the arrival of the train from Raleigh, at 11.55. Their conversations were always more or less secret and suppressed; they seemed very anxious in their movements in anything they had to say to each other for about an hour before the arrival of the train referred to at 11.55, they were from the McAdoo house to the depot, and most of the time they were about the platform at the depot. This was the train Mr. Garrett came on; they were there when the train arrived. For a few minutes before the train came Thompson was standing before the entrance for white people at the main depot with his back right up to the wall; Hawley and Gonez were further down to near where the street crosses the railroad; they were near that point. There was a large crowd down there, and they were moving about in the crowd. Hawley and Gonez Bono were together; that was the position when the train came in. I did not know Garrett and I was watching who Thompson would go to see when the train came in. He walked up and met Garrett about one-third of the way from where the train was standing. Thompson and Garrett walked into the waiting-room and had, I suppose, five or ten minutes' conversation. They then
got up and came out of the waiting-room, turned around the
146 corner by Scott's store and started up the street; next came round on the other side of the depot and kept on the opposite side of the street from the one that Thompson and Garrett were going up, and they went about 30 or 40 yards behind Thompson and Garrett to the McAdoo houes. Garrett and Thompson went into the McAdoo house and took a seat on a bench in the lobby, just outside the desk. Gonez walked beyond the depot to where Washington street crosses South Elm at Scott's store, and took a stand there round the corner of the building and was watching the McAdoo house. Hawley got into a stairway leading up into one of those buildings right opposite the McAdoo house, occasionally coming out to where he could see and then retreating. I walked into the McAdoo house and saw Garrett and Thompson in conversation sitting there on the bench. I sat down a little while, and then got up and went into Holton's drug store and watched the movements of Hawley and Garrett; one was standing there watching from the corner, the other was in the stairway. When Garrett went up to dinner, I went up to dinner; returning at 2 o'clock, I drove in my buggy down and stopped a little north of J. W. Scott & Co.'s store, walked on down to Holton's drug store and went in. I saw Thompson drive up to the McAdoo house in a buggy and stop and I saw

Garrett come out and then get in the buggy. I am pretty positive that Hawley went across the street and said something to Thompson at that time; Thompson with his buggy was on the street. After they went off I went to my buggy as quickly as I could. I did not know exactly where they were going, but I had fairly a good idea, knowing the country as I do, from the way they started. I drove down to Ogburn's livery stable where Patterson was to meet me, in case they should start out to the woods anywhere,
147 and as I drove into Davie street, Gonez came up driving very rapidly the old horse that I knew very well belonged to Mr. Vanstory's livery stable. He drove on very rapidly until he got to the depot, and some freight trains crossing the street detained him a few minutes, and made him very restless and nervous. Finally he got across, and I saw him going pretty rapidly up Asheboro street. In the meantime Patterson came up. I told him what I had seen. We got into the buggy and started off, and I think the first sight we got of them was just before we got to the late Judge Settle's residence. We saw then Thompson and Garrett in the buggy, and Weatherly and Mims riding on horseback some two or three hundred yards behind them. We went on in that position until we got about two miles from town, and at — place, just about 2 or 2½ miles from town, Thomson stopped his horse, got out and went up to the well and got a drink of water, and when he stopped his buggy and got out Weatherly and Mims stopped their horses. I then whipped up my horse and drove up rapidly, without stopping as I passed them, said, "For God's sake men, turn and go back and don't stop here." They turned round and went on, and then I drove on as fast as my old horse could go, right by Garrett and Thompson at the well and some three hundred yards I suppose across the creek. When I got across Buffalo creek and looked back, nobody was in sight. I stopped my horse and remained there some three or four minutes and looked back and saw Thompson and Garrett turn off and leave the main road, and drive rapidly through the body of pines, leading round down Buffalo creek, drove my horse over the road, went back across the creek and Weatherly and Mims were then in sight. I beckoned to them to come on. They rode up pretty rapidly to me. Weatherly and Mims turned off the road, then fol-
148 lowing the tracks of the buggy that Howard and Garrett were in. I took Patterson with me and went right down the bank of Buffalo creek, and when we got about 200 or 300 yards down the creek I saw the buggy that I saw Gonez leave town in, hitched to a tree. Immediately beyond that was a pretty dense thicket; bamboo vines, grape vines, blackberry briars, and all such stuff. Patterson and I had not advanced more than 200 steps beyond where that buggy was hitched before we heard conversation going on in a very exciting manner. We remained there a little while and listened to it, as long as I felt it safe to do so. There was only one doing that kind of talking, but the other was in conversation a little beyond, some 20 or 25 steps, I reckon. Patterson went down the path and turned into the thicket, and I turned into the thicket and went im-

mediately to where I had heard the conversation. We did not make any noise as long as we were in the path. The leaves were very dry, and in fact my hat fell off, and I made some little noise, and when I got in some 25 paces of where Gonez was located, he rose right up and started toward me, using this peculiar language, and I covered him with my pistol, and said, "Throw up your hands, or I will shoot you, and I have the authority." First he did not throw up his hands. The second time I commanded and said, "Throw up your hands, or I will put a ball through you." When I said that he went down on his knees. I advanced rapidly, where I could see well, keeping him covered with my pistol. "Now, if you move a hand or muscle I will kill you," I said; "Close in, men." I did not know how many were around. I had my deputies surrounded and I wanted to get all I could. About that time I heard
Patterson get up to Thompson and Garrett, and I could not
149 from the distance I was at, and in the excitement and confusion, I could not tell exactly what they were saying, though I could hear them and see them. After I had hollered to the deputies to close in, and after I saw Weatherly and Mims get up to Garrett and Thompson, then I did not suppose any one else was in there, as they had come in without stopping anybody. I hollered to Patterson to come to me; the excitement had kind of worn off then and I saw Patterson was getting very near the Indian, and I let him go on until he got in ten feet of the Indian, and then I said, "There he sits right by you."

14th ex. Counsel for defendants here ob-
14th excep. jected to any further evidence as to what occurred after last statement of witness; because it appears by the witness' own statement that the alleged conspiracy was put at an end by the arrest of one or more of the defendants. Objection overruled. Defendants, by their counsel, then and there except.

I had just gotten up to the Indian. Patterson walked up to him and jerked his mask off. I found it on defendant Daley. He took off the mask, his beaded coat and red bandanna handkerchief. He looked like an Indian when he had his garb on. He was a very good representative.

Two cases were here shown witness.

I saw these cases when I went up to the Indian before I put my hands on him; they were only a few feet from him.

15th ex. Here counsel for defendants moved
15th excep. to strike out evidence as to showing the cases because an act or fact not of the *res gestæ*, immaterial and irrelevant. Motion denied, to which ruling of the court defendants, by their counsel, then and there excepted.

The first sight that he got of the Indian, was when he heard
150 him coming; he rose up out of the brush. I don't know where he got his pistol from; he had it waving to me, when I first saw him. When the mask was jerked from him he did not say anything. I then picked up the cases and this mask, I think both of these cases, and Patterson led the Indian up to where Gar-

rett and Thompson were. I saw one of the gold bricks uncovered about like this now. I recognize it by the mark that was made on it at the time. It was 6 or 7 feet from Thompson and Garrett. I saw the brace and bit that was exhibited here this morning. I could not say that I saw the scales. I saw the episode between Garrett and Thompson about the card that Daniels got from under his foot; it was not under his foot, but it seemed that he was trying to stick it up his trouser's leg.

The card is produced and identified by witness and offered in evidence.

16th ex. Defendants here objected to the witness stating anything in reference to the card taken from under the foot of defendant Thompson, or any declaration made by Thompson as to the same, as an act or fact occurring subsequent to the termination of the alleged conspiracy and arrest of one or more of the defendants. Objection overruled, to which ruling of the court defendants, by their counsel, then and there excepted.

16th excep.

The signature on the card is that of defendant Hawley. I took the card and put it in my pocket. Patterson and I left and came back to my buggy, and left the others to bring in these that had been arrested. Patterson and I drove rapidly back to town. I left my horse standing at the depot; Patterson got out on one side of the street and I on the other. Just before we got in front of
151 the Hotel Guilford, Daniels came up and we all joined there just before we got to the Hotel Guilford, and Hawley was standing in front of the Hotel Guilford looking down the street. He was just looking anxiously down the street. Patterson, Daniels and I walked up to him, and told him to come into the hotel very quietly, he turned right round and we all walked in together right into the reading-room and sat down. I said, "You can consider yourself under arrest." I told him I was sheriff of the county and had a warrant for him. I showed him this card and asked him if he knew it; if he knew anybody in Greensboro. He said he did not know anybody here, and he had never seen the card. I asked him if he had a room; said he did. I said, "Let's go to it." He, Daniels, and I went up to his room, and picked up a case he had; it looked like a dress-suit case.

Q. What did you find in the first one?

17th ex. Defendants object to any further evidence as to what was found in defendant Hawley's possession, or what was said to him by the sheriff of the county or any one in his presence at the time he went to his room, and before taken from the hotel while under arrest. Objection overruled. Defendants except.

17th excep.

Q. What did you find in the first one?

A. Went through the case and found nothing much except his personal effects, clothing, combs and brushes, and articles of that kind. We took this, closed it up, and picked up another case in the room, kind of a square case, and it was locked. I asked him for the key. He said he did not have the key. I asked him whose it

was. He said it belonged to a friend of his who had gone to Florida and left it in his room. In the meantime the key were given
152 over to us, and the second one we tried unlocked the case. I found this bag in his room, but it is necessary to state how it was found; I found it in the trunk of the Indian, when I examined it in the hotel, after I got possession of that trunk. We did not find that trunk that day. Late Sunday afternoon, as a matter of precaution, as I was the custodian of those people, I thought it best to search them. I went to the jail with my deputies and did so. I found a trunk check under the lining of his vest. I went to the Hotel Guilford and after some little search found this trunk in a back hall, in not a very conspicuous place, and I took possession of it, and went upstairs and we searched that and in that Indian's trunk I found that bag which you have in your hand. I found some things in this case; I found these blanks purporting to be assayer's blanks, and quite a number of typewritten letters.

These were offered in evidence and marked Exhibit C.

These were typewritten communications addressed to Harry, or William, or Henry, and in substance all the same, and to the effect that the addressee had been reappointed to the staff of the mint assayers, by the Government at the mint at Philadelphia. I don't remember where I first saw one of these letters. I found some safe keys, a good many bits, a dirk and bronzing fluid in the case belonging to Gonez Bono; bronzing fluid like that on the brick, and a lot of copies of Bradstreet showing all the banks in the country and portions of Canada; how the vaults were located, names of the officers and things like that; a very complete guide to all the banks in the country; railroad guides and maps, very complete, well gotten up and nicely bound. Bradstreet's Reports gives the rating of different men of wealth.

153 18th Ex. At this juncture, the defendants, through their counsel, moved to strike out all the evidence
18th excep. of the witness, as to the acts and disclosures or conversations with any one of the defendants in the absence of the others; and any and all evidence of the witness relating to property belonging to any one or more of the defendants, which was by the witness discovered and investigated subsequent to the arrest of defendants in the woods, because the same is not of the *res gestæ*, is immaterial and irrelevant. Objection overruled by the court, and defendants, by their counsel, then and there except.

I remember two different sets of maps spoken of; one in Hawley's baggage and one in the Indian's trunk. The Indian was stopping at the Guilford hotel.

Being cross-examined by Mr. Barringer, he testified in substance as follows:

J. F. Jordan—Cross-exam. I saw Howard with Hawley the day I made the arrest, a few minutes in front of the Guilford hotel; people were passing at the time

as usual; saw them down street further, that afternoon standing on the pavement; saw them about three times the first day; once at the hotel, and twice in the afternoon; don't know if he was a guest at the Hotel Guilford, except I saw him there and his name on the register. Went up to his room and looked in that case at the hotel. The next day after I came back from the woods saw Hawley go in the stairway opposite the McAdoo house. He went in and turned around and came out. He staid in there nearly thirty minutes; right inside the first entrance. He came from the depot about four or five yards beyond Garrett and Thompson, with a crowd that were at the depot. A great many people were going up the street on both sides. Hawley and Daley separated just before the
154 train came in; saw them together just before the train came in at the entrance of the white ladies' place of reception. I saw Hawley by himself at the depot in a great crowd of people. Saw Howard and Hawley together at the depot where South Elm street crosses the railroad.

I found three maps in Hawley's satchel. I saw him standing in the stairway between two or three o'clock. Don't know if Hawley and Daley had the same room at the hotel; I presume they roomed together from finding their baggage together; that is, this assayer's case was in Hawley's room; don't know if it was his. I think I made a mistake about their rooming together. I have been talking about Daley's baggage when I meant Hawley's baggage; I have been talking about this case when I was in Hawley's room. I will say I don't know anything about the room; I was mistaken about this baggage.

Being cross-examined by Mr. Gilmore witness said:

Q. Were you present at the preliminary hearing of this case?

A. I was.

Q. I will ask you if it is your memory if Mr. Garrett was asked the question at that time, if Mr. Thompson didn't say to Mr. Garrett, "I have never asked you for any money, have I, Mr. Garrett?" And Mr. Garrett replied, "No. But I have got $10 of yours and I will have more?"

A. I remember that there was something of that kind said; just what it was I don't remember.

Further examination in direct by Mr. Brooks:

J. F. Jordan—Redirect. Said he never heard Garrett say that he had ten dollars of his money, and would have more, but he heard them have something like a quarrel.

155 In Hawley's room the only baggage I found was this case and Hawley's satchel, which he then disowned and declared having a key to; when urged he produced the key.

To further prove its case the State called W. J. WEATHERLY as a witness, who, being duly sworn, testified in substance as follows:

W. J. Weatherly—Direct exam. My name is W. J. Weatherly; am deputy sheriff of Guilford county; have served twenty years as policeman, three years as deputy sheriff. Sheriff Jordan first intimated the presence of the defendants in Greensboro on Thursday, March 21, 1901. I went on the street looking for the men and saw Thompson standing against a store on South Elm street eating an orange. He looked rather rough; had on a sort of brown-looking suit and flannel shirt; broad-brimmed hat, his hair being longer than it is right now; beard all over his face, but not so very long—a good heavy beard. I saw him on the street several times that day—up and down the street—and think I saw him and Hawley together once or twice. The first time I saw them together about the Guilford hotel, then toward the depot near Scott's store. I saw them together twice on Thursday in the afternoon; I saw Mr. Daley with Mr. Thompson once in the afternoon near where Jim West keeps on South Elm; they stopped, had a few words, and passed on down the street together. That is about the only time I saw them on Thursday. I saw them the next Friday morning; saw Mr. Thompson first; he seemed to be walking up and down South Elm street. Then I saw him and Mr. Daley in the morning the first time where the Benbow hotel is building now. I saw them meet there; I think they stopped and had a little talk, and Thompson went on toward the depot and Daley came up the street.

I saw Mr. Thompson on the street pretty regularly all the
156 time up and down towards the depot. I was at the depot when the train came in on Friday, which Mr. Garrett came in on. Saw Mr. Daley and Mr. Thompson both at the depot, and saw Mr. Hawley at the corner at Cleggs'. Mr. Thompson seemed to be standing back against the depot for awhile, just before the arrival of the train. Mr. Daley passed him two or three times up and down the platform, and would speak to him as he would go by; they made remarks to one another; just before the train came in, Mr. Thompson, who was walking up and down the platform, seemed to be restless, and Mr. Daley would pass him every once in awhile; they never passed without they looked like they spoke, saying something to one another. Hawley was walking on the platform part of the time, and for awhile stood back against the depot near the sitting-room door. I left him right on the corner. Cleggs' corner is just across a narrow street not more than 20 feet from the depot. One standing there could readily see passengers leaving the depot. When the train came in and Mr. Garrett got off, Mr. Thompson spoke to him, and they went into the depot; I went in there too and they went over to the northeast corner and sat down and talked a little while there and came out; I followed along. Mr. Daley was then standing on the north corner of the depot, the one towards the railroad. He was standing on the platform of the depot at Clegg's hotel. I didn't see anything more of him until I came out. Mr. Daley went across the street, on the right-hand side of the street,

and as Mr. Garrett and Mr. Thompson went down on the left-hand side of the street, he went down on the right-hand side, and Mr. Hawley followed along behind him. I was right behind him. Mr. Garrett went on down the street. He and Mr. Thompson went
157 in the hotel. Mr. Hawley went down below a drug store, and went and stood up in a door. Mr. Daley came across and looked in the hotel, and went across to him and said something to him; then he went right up the street to Mathews-Chisholm-Stoud's corner, and stood around the corner. He stood there waiting some time. Mr. Hawley was right in front of the hotel, and Mr. Daley was a little further up the street, and could see the hotel. I saw him when he left the corner at Clegg's hotel. He came on down the street at a pretty good gait. The stairway he was standing in the door opens right on the street; you come in and it is some five feet I reckon before you strike the steps to go upstairs. He was standing right inside. I don't know what become of Mr. Daley at the corner; that is the last I saw of him, but Mr. Hawley stood there for awhile, round about, and after awhile Mr. Howard drove up with a buggy in front of the McAdoo House. Mr. Hawley went across the street and said something to him. He had come on the outside of the door. He went across the street to speak to Mr. Howard. When he came back across the street, he was looking around, seemed to be very restless. I was standing looking through a window at him. He started in the house that I was in. I got under the counter. I told the young man if anybody came in there and asked for me to tell him he knew nothing about me. He came in the house and stood in there a little while and went out. I was hid under the counter. This was Jim West's place of business. He went out and I went to the door and looked out, and saw him go into the shoe store. Garrett had come out and got in the buggy then, and started up the street. I had a horse over at Ogburn's stable right across the street. When he went in the shoe store I went across the street, and went down there and got my horse; met Mr. Mims there. He and I
158 got on our horses and rode the other way. Just as we got around the other way, Mr. Garrett and Howard came out of the lot where a livery stable stood. We met them nearly face to face. We turned right down the street and let them get on a piece. Mr. Garrett and Howard had gone on in a buggy. We turned down and came up to the court-house a piece, then we turned back and followed the buggy on out. We drove very slowly and tried to keep back about the proper distance. About 2½ miles from here we came in behind a wagon; the wagon stopped and for some reason or other the buggy was brought close to it. They stopped. Mr. Howard got out and went and got a drink of water. Mims and I were pretty close on them then. Sheriff Jordan drove right up behind us. He drove on by us. We got down then. They drove on then after they got their water. We followed on, then turned out to the left and went down through the pines. We went on down to the bridge and met some other parties; dismounted and tied our horses; and Mims and I undertook to follow the buggy track

through the old field, we followed it to the pines. There was a double track, but we didn't notice that until we came back. We followed one track to the road. We came to a different horse and buggy altogether, a horse that I knew very well tied out there, and it was not the horse that I was following. We went back to the path, and took the other track, and went down and found the other buggy tied in the woods. We went down to the creek, I reckon probably 100 or 150 yards. I heard some one talking. The first noise I heard I couldn't understand at all. It -as sorter of a j— — — — —. Then I heard the sheriff's voice. I knew his voice. I heard him holler: "Close in! Close in!" We went right in then, and I saw Mr. Garrett and Mr. H[illegible]ard standing by
159 a tree. Garrett had his hand on his shoulder. Howard was standing there with a brace in his hand. I went up to him and asked Garrett who he was. I think he said, "I am in charge of this man." I said, "You get away from here." At this time Mr. Garrett had his pistol out; at this time I saw one of the bars of metal.

19th excep. 19th ex. Here defendants objected to any further examination of witness relative to anything done or said further, or subsequent to the time that the officers arrived in the woods and arrested any one or more of the defendants, because it is a circumstance occurring subsequent to the consummation or discontinuation of the alleged conspiracy, is immaterial and irrelevant and not of the *res gestæ;* which objection was overruled by the court; to which ruling defendants then and there duly excepted.

I saw a gold brick on the ground; there was but one open and another one wrapped up in a cloth that was opened afterwards. I know nothing about the baggage of this gentleman, that was at the hotel. I saw the Indian garb.

Being cross-examined by Mr. Gilmore the witness said:

Weatherly—Cross-exam. I did not see Mr. Patterson at the time he put Mr. Thompson or Howard under arrest, but did soon thereafter. I participated in searching Mr. Thompson for weapons; I found a revolver in his pants' pocket, and took it out myself.

Being cross-examined by Mr. Barringer witness said:

People frequently located on the corner at Clegg's hotel, where he saw Mr. Hawley standing. One standing there where he was could not see the passengers get off the train; when the train pulls in from the east it usually leaves the hindermost coach in
160 full view of the street, so Hawley could have seen the crowd alight from there from the position in which he stood. I went down there to watch for Garrett; saw Howard meet him; there was a great many people at the depot walking about. Mr. Hawley was walking about.

Re-examination by the SOLICITOR:

Redirect exam. Mr. Thompson had his pistol in his inside pants pocket on the inside; it was not in his usual pocket. I recognized Thompson on the street by the description I had of him from the sheriff. I saw the letter the sheriff had.

The State further produced GARLAND DANIELS, who being first duly sworn, testified substantially as follows:

Garland Daniels—Direct exam. My name is Garland Daniels; I live in Greensboro; I remember the occasion, the 21st day of March, the day preceding the arrest of the defendants; I was in town but did not on that day see any of the defendants; I saw them on Friday; saw Mr. Howard first about 8.30 o'clock when I was going to breakfast. He attracted my attention by looking back at me, as he was quite a fine-looking fellow for a workingman. I kinder sized him up. I saw him no more that day. I saw Mr. Hawley and Daley on Friday, paid no attention to them at first; they looked at me as I passed them on the street, which did attract my attention very much. I watched them standing on the street together for some little time. I saw them two or three times in a door across from the McAdoo house, which is right across the street from my store. My office is in the window of my store, where I could, without trouble, look across the street. I saw them talking considerable; they would first go up to the corner around Shields' shoe store and then to West's place. I saw them separate and meet at the doorway again.
161 Howard put up a fine appearance for a farmer; he looked fine; he was walking with his hands folded behind him; had a beard then, and attracted my attention. Had on a kind of light suit, gray mixture of some kind; think he had on a soft shirt. I followed the party out to where they were arrested. I got there just in time to hear the Indian make a sound something like a dog barking. It was all done so quickly. I have seen this card before marked Exhibit B.

20th except. 20th ex. Here defendant Hawley, through his counsel, objected to the evidence relating to the card found at the feet of defendant Thompson, at the time the parties were arrested in the woods near Greensboro, because a matter occurring in the absence of the defendant Hawley and not of the *res gestæ*, and is immaterial and irrelevant. Objection overruled by the court, to which ruling defendant then and there excepted.

I got the card from under Mr. Howard's leg in the woods at the place of the arrest. Shortly after I came up they handcuffed Mr. Howard and Mr. Daley, and they sat down by a large tree, and were sitting there while Mr. Howard tried to put this card under his leg; I lifted his leg up and picked it up and gave it to Sheriff Jordan; there was on it "Henry D. Hawley, Hotel Guilford." I was then deputized to go to town and I went ahead of the sheriff, and Mr.

Weatherly was to hold the prisoners for an hour in the woods. I passed the sheriff and came to town; I sent my horse back by another gentleman and came up the street, and saw Mr. Hawley standing in front of the hotel; he was standing on the left of the door going uptown. I passed by him and took my stand on the other side of the door and at the other window. He had a very nervous appearance; he was twisting his mustache and look-
162 ing up and down the street and seemed to pay no attention to me while I was watching him; he stood there some little time and I saw Sheriff Jordan and Mr. Patterson coming up the street, and as they came up the street I went in the ladies' entrance to the Guilford, and they brought Mr. Hawley in their door, and I followed them. They took him back in the writing-room and read a warrant to him.

21st excep. 21st ex. Here defendants make a motion to strike out all the evidence of the witness relating to his own acts, or of the conduct or appearance of defendant Hawley, subsequent to the arrest of either of the defendants in the woods, as not being of the *res gestæ*, and because it is immaterial and irrelevant. Objection overruled by the court, to which ruling defendants then and there excepted.

Sheriff Jordan asked him if he knew anybody here; he said he did not. I asked the sheriff to give me that card, and asked him if it was his. He said it was not. We then went up to his room. We found two cases there, one a dress-suit case and an assayer's case. When we got in Mr. Hawley's room, Mr. Patterson asked him whose things those were; he said the suit grip was his, as to the case, it belonged to a friend down South, and he asked him if he had the key to it; he said he didn't. Mr. Patterson asked him to give him his keys; he did so, and he unlocked the grip and the case both. They then left the gentleman in the custody of myself. We sat in the room a few minutes; it was rather warm, and I insisted that we go downstairs. We went down in the office, and stood there for a while. We left the office pretty soon. Mr. Hawley said he had taken a little medicine and asked me to go to the toilet-room with him, which I did. There Mr. Hawley reached in his pocket and pulled
163 out this envelope, he tore it half in two. As he did I grabbed him back of the neck. He threw this into the sink and grabbed for the chain. As he did I grabbed him; in the scuffle I secured the letter out of the sink. You can see it has been in the water.

Here the letter marked Exhibit D was read in evidence. It was a typewritten letter to Harry suggesting that he had been reappointed by the United States Government to the position as assistant assayer at the mint at Philadelphia, and signed in typewriting. ——. Witness identifies another letter as being the same found in the assayer's case.

Being cross-examined the witness said:

Cross-exam. Before I went to the place with Mr. Hawley that he requested me to go, I had already

taken this case from his possession; it had been seized by the sheriff and had been opened and the contents examined, not thoroughly examined. These letters were found in the case after it was thoroughly examined. The officer had taken it from the hotel and examined it for whatever was in it. I am not an assayist and will ask Mr. Hawley to explain what an assayer's outfit consists of. While I do not know what an assayer's outfit consists of—the case had scales, acids of different kinds, and also a little bellows; that is all. I understand it is an assayer's outfit—it may be something else. I could take an acid and test gold myself with it.

Witness was then asked the question, "What is exclusively used in an assayer's outfit that is not used in anything else?" when the witness remarked, "I don't know that you could find anything that could not be used for something else." And the court said: "You cannot examine the witness any further on this subject, as the witness has stated that he does not know what constitutes an assayer's outfit."

164 22nd ex. Here counsel for defendants objected to the remarks and ruling of the court as being an
22d excep. expression of opinion prejudicial to the defendants and an undue limitation of their right of testing the witness' knowledge with respect to what the case and its contents were. Objection overruled by the court, to which ruling defendants then and there by their counsel excepted.

The State then called BANKS BOONE as witness, who being sworn testified in substance as follows:

Banks Boone—Direct exam. My name is Banks Boone, I live in Greensboro. I remember the 21st or 22nd of March this year when defendants were arrested. I was in town that day; saw Mr. Hawley. Was then working for Simpson Shields Shoe Company, situated diagonally across the street from the McAdoo hotel; saw him after dinner. I was standing near the door, and the door was shut. There was a gentleman came in the store, said "Good morning," and slammed the door behind him on the inside. I walked up to him and asked him if there was something I could do for him. He said no, he ran in there to dodge a man. He stood around in there a few minutes and I talked with him. I reckon he was in there possibly five minutes, then he turned around, looked over the store and said, "This is a wholesale shoe store, isn't it?" I said, "Yes." He said, "I am a shoe drummer myself." We passed a few words and then he went out.

The State then called HENRY WHITFIELD as a witness, who, being sworn, testified in substance as follows:

Henry Whitfield—Direct exam. My name is Henry Whitfield; I work at the Guilford hotel; was there last March. Remember when defendants were arrested. Saw Daley in the morning and he told me he wanted me to let him

out; that he would be in with a buggy some time that
165 day, and he wanted me to let him out. He went in to dinner; I held the horse for him. He got out, went in the house, got his satchel and came back and got in the buggy and went on out, and told me he would be back between three and four, or five o'clock, and to be there to let him in. I did not notice the satchels particularly when he came out with them; I did not notice what kind they were. That was the usual place for loading the baggage; we generally loaded the grips and smaller pieces at the front of the house. I kept the gate locked. He did not come back the evening he went out; he paid me a quarter. He was stopping at the hotel.

23rd ex. Defendant Hawley, by his counsel, in ample time objects to the testimony of the witness, because it re-
23d excep. lates to conversation between the witness and defendant Daley in the absence of defendant Hawley, and because it is irrelevant and immaterial, and moved to strike out his testimony, which objection and motion was overruled by the court, to which ruling defendant Hawley then and there excepted.

The State then called Dr. TURNER, as witness, who, being sworn, testified in substance as follows:

My name is J. P. Turner; am coroner of Guilford county; reside at Greensboro. I remember to have seen and
J. P. Turner—Di- examined the trunk that Mr. Jordan spoke
rect exam. of yesterday, for which he got a check from defendant Daley, and opened it down at the Hotel Guilford. It was found, I think, on the day following the trial, the preliminary hearing. There was a research made and this check was found, as I understand it, on the person of Gonez Bono. I examined it the same day it was found; the check
166 was turned over to me. This was Saturday, I think, and at the same hotel where he was stopping.

24th ex. Here defendants' counsel objected
24th excep. to the witness testifying with reference to the trunk and its contents found after the arrest and incarceration of defendants, as not being of the *res gestæ*, incompetent, irrelevant and immaterial. Objection overruled, to which ruling of the court, defendants by their counsel then and there excepted.

It was found at the Guilford hotel, where Hawley and Daley were stopping. The trunk was a box arrangement; a strong trunk, well bound with iron, and had on it two locks, one at either end towards the end, not in the middle like an ordinary trunk. I suppose the trunk was about three feet long by eighteen inches wide, and about fifteen inches deep. The inside arrangement was in layers or trays. The first tray contained just simply some of their paraphernalia, I don't remember exactly what, a place built especially, it looked like, for these two cases that contained the gold brick, and there was a board there to wedge in between them so as to make them station

ary so they could not move. In the lower part of the trunk I found quite a number of maps of the Southern States, and some parts of Canada, the eastern part of Canada especially, and also some well-bound copies, parts of copies, of Dun, a part of Bradstreet and Dun; I think this was Dun's part of it, bank reports, reports of the wealth of men throughout the country, and also all the bank officers, and the amount of shares that the different men held in banks. There was also in the bottom of this trunk, in different compartments, for holding this material, bronzing liquid, in fact a bronzing outfit, bronzing liquid and bronzing powders, together with two brushes in good order. Also quite a number of bits like this in
here, like this part of it (showing jury). Some four or five,
167 possibly more, of the new shawl straps you saw around the
second brick that we opened here yesterday; and three or four or more of the oilcloth covers like was around those bricks.

I saw no flannel wrappers or goods in the trunk. There was also some 12 packages of borings, which on being tested proved to be pure gold. I have studied chemistry and am familiar with acids upon metal, and I say it was pure gold. I don't remember anything else in the trunk. The gold was fixed up in nice little paper, colored slightly, not exactly brown; packages 2 or 2½ inches long and 1½ inches wide.

Being cross-examined by Mr. Gilmore the witness said:

Cross-exam.

In the capacity of coroner of Guilford county I handled the writ in the suit of Paul Garrett against J. L. Howard; I served the paper; I levied upon the property belonging to these defendants; by that writ I levied on their baggage and the money they had on their persons, and such other effects as could be found belonging to them; I don't remember the exact amount of money, but I have got it in the bank; it is $300 and some odd dollars, possibly $400. I levied on their baggage. There was some clothing; I levied on one hat and some slippers or shoes; I don't remember which. As nearly as I could I took everything they possessed on their person, everything in the clothing line I suppose. That was just before the trial I believe. I don't remember what day; I don't remember the exact date when I got possession of the writ. I have not the writ with me, it is filed in the clerk's office. I think it was Saturday morning I received the writ, and I executed upon it immediately. I don't think I made a second levy under it
after the preliminary examination. The trunk was given
168 into my custody after the preliminary hearing. I don't
know whether you call it a levy or not, I was sent for to take charge of the trunk, I took it into my custody subject to the preliminary hearing in this case, and I don't know whether or not I levied on the trunk by virtue of that attachment or not; I had no other authority than that attachment writ for doing so. I now claim custody of the trunk on the authority that attachment gave; I don't know what else. I supposed I held it by that attachment. I have the money in the City national bank. It is in my name for them; for the men whose persons it was taken from. I have had the cus-

tody of the Indian outfit since levying upon it by that attachment writ. I have made an exhibition of it since then to a great many people. I have let them see it. I could not tell how many had seen it in my office, too many to remember; one man was dressed up in it with my permission.

Being re-examined in direct by Mr. Brooks.

25th excep. 25th ex. The trunk and contents spoken of by witness were offered in evidence, to which offer the defendants, by their counsel, then and there objected. Objection overruled and exception.

Redirect exam. The trunk being of the description heretofore given and contained therein was: One book, Duns' rating on Tennessee, Louisiana, Mississippi and Missouri; one copy of the American Bank Reporter, printed by Aaron; one copy marked American Bank Reporter, without the printer's name; one pair of wire-cutters; one hand vise; one screw-driver; one pair small pinchers; one 2-foot rule; one 3-cornered file; one pair scales; 17 packages borings, purporting to be gold borings; four squares of oilcloth; 7 shawl straps; quite a number of small bitts; several small brushes; three cans of bronzing liquid; two bottles of bronzing powder; bunch of hand maps of the different Southern States and parts of Canada; quite a number of blanks.

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26th excep. 26th ex. Here defendants moved to strike out all the evidence offered by the State by the trunk and its contents, and as testified to by the witness. Motion being denied, defendants by their counsel then and there except.

The witness proceeding, said: I remember the day defendants were arrested; had seen Hawley and Daley at the hotel. I don't know the day, it was several days before the arrest. Mr. Daley was there the first time, it was a week I think, or close on to that before the arrest. He was there three days and a quarter, or something like that. Paid me his bill, and left, I think, on the 9.55 train, and said he would come back. He came back. The first time he came he brought some baggage with him, a trunk, which was checked and left in the office.

28th excep. 28th ex. Here defendant Hawley, by his counsel, objects to the testimony of the witness, because it relates to conversation and acts between the witness and defendant Daley in the absence of defendant Hawley, is irrelevant and immaterial; which objection was overruled, and defendant Hawley, by his counsel then and there excepts.

I gave him a check for the trunk, and it was put in the hall between the elevator and the back door of the private entrance. It was there from that time up to and including the time of the arrest. During that time Hawley stopped at the hotel. He came there about two or two and a half days, I think, before the arrest; I am not positive about that. He remained there from the time he came until the arrest. The trunk was the only piece of baggage that I saw Daley have. The trunk was delivered to the sheriff; there were two came there after it.

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The morning of the day of the arrest Mr. Harley was put on call for five o'clock. There is a train coming into Greensboro at 5.48, running from Washington to Columbia. One coming from Richmond might readily come on that train. It is a reasonably direct way by Danville from Norfolk. Don't know that prior to then Daley or Hawley met this train, they had never been put on call before. The passenger coach arrived from Raleigh in the morning about 5.15.

Cross-examination by GILMORE:

Recross-examination. I was present in the court-room yesterday and heard the examination in this case.

29th excep. 29th ex. Here counsel for defendants moved to strike out the testimony of the witness, upon the ground that he was in court yesterday and heard the evidence of the witnesses testifying in the case, in violation of the order of the court that excluded all the witnesses from the court-room during the progress of the trial. Motion overruled, and defendants by their counsel then and there excepted.

In examination by Mr. Barringer witness said:

Mr. Hawley came on the 5.48 train for breakfast. He registered his name and I gave him a room to himself; Daley had a room by himself.

Being examined in redirect by Mr. Brooks the witness said:

Re-redirect exam. I think Mr. Daley registered the first time from Roanoke, and from Danville, the second time. I don't think Mr. Daley's room was ever changed. Mr. Hawley's room was. He first occupied
171 No. 43 on the second sleeping floor, and was moved to 20 on the first sleeping floor. Mr. Daley occupied 23 on the first sleeping floor all the time he was there; that put them about three doors from each other across the hall.

The State then produced Prof. JOHN THOMPSON, who being sworn, testified as follows:

John Thompson, direct exam. My name is John Thompson; reside at Greensboro; am a teacher of chemistry at the A. & M. college. Was educated in the University of Minnesota. I specialized chemistry. I am capable of making tests and determining the weight of that bar there. I have made an analysis of the borings taken from these pieces.

Was then asked by the State solicitor this question: "What is the result?"

30 excep. 30th ex. To which question defendants, by their counsel, objected to any evidence tending to show the substance or material which constitutes the alleged gold bricks in evidence in this case, as the same are not of *res gestæ*, are immaterial and irrelevant, Which objection was overruled by the court, and defendants, by their counsel, then and there excepted.

The witness proceeding said: After testing I found them principally copper; I found no presence of gold. One was bored in three places and the other in two.

The gold bricks, and the cloths in which they were bound were offered in evidence, to which offer defendants then and there objected, because they were not *res gestæ*, irrelevant and immaterial, and moved to strike out the testimony of witness relating to them. Which objection and motion by defendants was by the court overruled and denied; to which ruling defendants, by their counsel, then and there duly excepted.

Marion Cobb. Direct exam. 172 The State then called as a witness MARION COBB, who being duly sworn, testified in substance as follows:

My name is Marion Cobb; my father is proprietor of the Hotel Guilford. I remember the occasion in March when these defendants were arrested. Prior to the arrest two of them, Daley and Hawley, stopped at the hotel. I have the hotel register in my hand, beginning in December and ending in April. This is the register in which they registered.

State closes. And which is all the evidence offered by the State to prove its charge against the defendants under the indictment and the several counts thereof.

Motion by defendants for State to elect. State elects to proceed on first count. Here defendants by their counsel, moved the court to require an election by the State on which count in the indictment it will rely for conviction against the defendants. Whereupon the State, by its solicitor, elected to rely upon the first count in the indictment and enter a *nolle prosequi* to the second and third count of the indictment, the other counts to be referred to as furnishing particulars. Which being done and entered by the court in the said cause, the defendants moved the court to instruct the jury that upon the evidence adduced in this case, the defendants as a matter of law are not guilty and the jury should so find and return their verdict accordingly. Which motion of the defendants the court overruled, to which ruling of the court the defendants then and there excepted.

Defense declines to offer any witnesses. 31st excep. 31st ex. That thereupon the defendants offered no witnesses or evidence in the cause and at the conclusion of the evidence and before the argument of counsel was begun, the defendants asked in writing the following special instructions:

173 *Instr. Prayed by Defense.*

"STATE OF NORTH CAROLINA,
Guilford County.

In the Superior Court, June Term, 1901.

STATE OF NORTH CAROLINA
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley.

Defendants' Prayers for Instructions.

At the conclusion of the evidence the defendants asked in writing the following special instructions:

I.

"To constitute an indictable conspiracy there must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. This definition of the conspiracy being applied to the case now before the jury means that the conspiracy alleged to have been entered into by the defendants, must have been done with the intent either to cheat or defraud or to rob an innocent person, who did not know of its existence, of his property, or to deprive an innocent person of his lawful right; so that if the jury find that Paul Garrett, the party whom it is charged in the bill of indictment the defendants conspired to cheat or rob of his property, entered into the contract as alleged with Howard with the knowledge or belief on his part that it was a fraud that was attempted to be perpetrated upon
him, then I charge you that he is not such an innocent per-
174 son as is contemplated by law, and the defendants would not
be guilty even although the alleged combination was to cheat or defraud Paul Garrett.

II.

"The court instructs the jury that the conspiracy charged against the defendants in the first count of the indictment herein consists in its criminality under the law in the means alleged to have been agreed to be employed by the defendants in the obtaining of the money of one Paul Garrett, and that as to such count it devolves upon the State in the first instance to prove by the evidence beyond a reasonable doubt that the defendants had actually agreed between themselves upon the means charged in said count to obtain of the witness Garrett his money, that is, secretly and with deceit and fraudulent intent and by false pretenses, subtle means and devices of a subsisting fact, the truth of which was unknown to the witness Garrett and which was intended to and capable of deceiving a person of ordinary prudence, exercising at the time ordinary care; and

unless you so find and believe from the evidence in this case you shall acquit the defendants.

III.

"The court instructs the jury that the conspiracy charged against the defendants in the first count of the indictment consists in its criminality under the law in the means therein alleged by the State to have been agreed upon by the defendants whereby to obtain the money of one Paul Garrett, and that in such case the burden is upon the State to prove beyond a reasonable doubt every essential element of the offence thus charged against the defendants, and show that the means there charged were actually agreed to be em-
175 ployed by the defendants as a means of obtaining from the witness, Paul Garrett, his money with the intent wickedly and maliciously to defraud him of it; and unless you find from the evidence that such was the agreement between the defendants so to cheat and defraud the witness, Paul Garrett, of his money, then you will find the defendants not guilty; and the jury are further instructed that in considering the evidence adduced before you by the State in this cause as applicable to the first count of said indictment, you should take into consideration the situation of the parties, their acquaintance with each other, of the probability or improbability of the story related by the defendant Howard to the witness Garrett at Weldon, the impression, if any, it made upon his mind, the assent of Garrett thereto and his knowledge of the scope and effect of the agreement assented to, and its nature and his participation therein, and if from such impression he was likely to be or was deceived thereby into the belief of the truth thereof, and whether the same was calculated to and capable of inducing him to part with his money to the defendants; and if you find from the evidence that such story as was then related by Howard to Garrett, that he in the exercise of ordinary prudence should have known or did know, was false, and that knowing its falsity he then and thereafter encouraged by his words and conduct the defendant Howard to believe that he, Garrett, believed in such story, and on such pretense advised and encouraged the defendant, Howard, into taking further steps of an apparent attempt to obtain the money of Garrett by and through the means suggested in the story related to him by the defendant Howard, and that in pursuance of such statements and requests by Garrett the defendant Howard came to the city of Greensboro in Guilford county and prepared himself with his co-
176 defendant, A. L. Daley, to show the witness Garrett the property in question and under inducements laid and held out by Garrett to the defendant Howard did transmit to him, Garrett, a telegram prepared and written by the witness Garrett addressed to himself, whereupon the witness Garrett came to Greensboro, and with the defendant Howard went to see the property so situated and described to him; and that arriving at the place where the defendant Daley, disguised as an Indian, and the property so spoken of, was, and that while weighing and examining it, the witness and a sheriff's posse arrested the defendants Howard and Daley; in that

event the court instructs you as a matter of law that the confederation or agreement between the defendants to so exhibit to him the said property was not an unlawful or criminal conspiracy, and this without respect as to what motive the defendants had or may have had in so arranging to exhibit to the witness Garrett the property in question, and that the acts, conduct and agreement of the defendants in this respect was not criminal under the law, and you should find them 'not guilty.'

IV.

"The court instructs the jury that if you find from the evidence that about March 20th, 1901, the defendant Howard called upon the witness Garrett at his place of business in the town of Weldon and related to him a story respecting his, the defendant Howard's, ownership of a mining property and gold taken therefrom, and of the relationship of a former partner by the name of Garrett whom he was seeking for the purpose of enlisting him in the business of developing said mining property, and disposing of the
177 product thereof, then stated to be in the possession of an Indian at the time being in the city of Greensboro, and that from the relating of such story by the defendant Howard, the witness Garrett either knew, or in the exercise of ordinary care, precaution and prudence might or should have known, the same was false and related to him for the purpose of obtaining and defrauding him of his money, and that knowing or believing it at the time to be so, he, the witness Garrett, falsely pretended belief of and confidence in, the story so related to him, and that it was intended to cheat and defraud him of his money, and that so believing he, Garrett, encouraged and advised the defendant Howard in taking further steps with respect to developing such plot as was disclosed in the story related by Howard to the witness Garrett, and that Garrett aided the defendant Howard in arranging the details and creating the situation of exhibiting to the witness Garrett the property in question at or near the city of Greensboro; the court instruct- you as a matter of law that nothing said or done or agreement entered into by or between any two or more of the defendants pertaining to the proposed transaction with the witness Garrett subsequent to his knowledge or belief in the falsity of the story related to him by Howard, are acts and agreements between the parties of which the witness Garrett may in law not be heard to complain, and that the transaction which occurred subsequent thereto concerning which the witness Garrett had participated in arranging for, was not criminal; and this irrespective of what was or might have been the intention or motive between the defendants in carrying out the details of such arrangements or the representations subsequently made to him by any one or more of the defendants with respect to the
178 quality or the condition of the property in question or what they intended to do with the same, and you should find the defendants 'not guilty.'

V.

"The jury are instructed that if they find from the evidence in the case that at the time the witness Garrett was approached by the defendant Howard at Weldon or during the conversation and transaction there had between them the witness Garrett then and there became satisfied and knew that the defendant Howard was proposing to him a scheme which was patently and evidently a fraud and a sham, and that knowing this to be true the said witness Garrett, for the purpose of gain, or taking his chances upon making money out of such scheme and plan as then proposed by the said defendant Howard, willingly and voluntarily entered into the same for such purpose and encouraging or in any way furthering the said enterprise, scheme or plan so known to him to be false and fraudulent, and then and there in any way directed or advised the said Howard how to proceed, or agreed to accept the proposition then and there advanced and proposed by the defendant Howard to him, the said Garrett, and undertook and agreed to become interested therein as a partner or shareholder for the purpose of furthering the said enterprise, scheme or plan with the hope of gain to himself, and that the said Howard then and there distinctly told the said Garrett that the object of the said enterprise, plan, or scheme did not contemplate the advancement, contribution or investment of any money whatever by the said Garrett, but that all he, the said Garrett was expected to do in connection with the said enterprise, scheme or plan, was that
179 he, the said Garrett, should manage and direct the same, and that the said Garrett with all these facts before him willingly and voluntarily assented thereto and advised the said Howard how he should further proceed in the matter, and that Howard, thereafter acting in obedience to the suggestions of the said Garrett, came to Greensboro and while here and promising him full compensation for his services while engaged in the furtherance of the said enterprise, scheme or plan, and that the said Garrett, as a matter of fact, was never cheated or defrauded or robbed of a cent by the defendants or any one of them, but in the furtherance of the said scheme or plan, he, the said Garrett, had accepted the money of the said Howard to cover the expenses of his said trip to Greensboro in furtherance of said plan or scheme, then and in that event there would be no criminal conspiracy as charged in the indictment, but the defendants as a matter of law would not be guilty and it is the duty of the jury so to find.

VI.

"If the jury should find from the evidence, that the prosecuting witness, Paul Garrett, in pursuance of an arrangement voluntarily entered into by him with the defendant Howard at Weldon, came to the city of Greensboro in the furtherance of an enterprise the details of which were fully made known to him by the said Howard at Weldon, and assented to by the said Garrett, and out of which the said Garrett was to receive compensation equal to that of the said Howard and his copartner, A. L. Daley, and that the expenses

of the said Garrett were paid in advance, and it was further made known to him at Weldon and at Greensboro after his arrival here, that no money was expected from him, but he was simply to take charge of the business and manage it, as one possessing superior intelligence and capacity, and that he gave his full and free assent to the same, and that upon his arrival in Greensboro, he, and the said Howard, in pursuance of their previous arrangements and agreements, repaired to the place where the property in question was to be exhibited for the purpose of allowing the said Garrett to inspect it, and in accordance with the terms of the said agreement as aforesaid made known to him, the said Garrett, at Weldon, and that in furtherance of the said plan and agreement, Howard and the said witness Garrett proceeded to the inspection of the property in question, and that while they were therein engaged the defendants Howard and Daley were interrupted, interfered with and arrested before the said inspection was completed in accordance with the agreement heretofore made between the said Howard and Garrett, which interruption and arrest was instigated by the said Garrett and planned and concocted by him before he left the town of Weldon and for the mere purpose of trapping the defendants, then and in that event the said agreement would not be a criminal conspiracy, and the jury should find the defendants 'not guilty.'

VII.

"The court instructs the jury that, although you may find from the evidence that the defendants actually came together and in terms agreed to obtain of Paul Garrett his money by false pretenses and to cheat and defraud him, yet if you further find from the evidence that when the false statements and pretenses were made by the defendants to the witness Garrett they were such as he knew at the time to be false or by the exercise of ordinary care and prudence should have known to be false, and with such notice and knowledge on his part he assented to the requests and demands of the defendants in the hope of profiting himself thereby, then you will find that the transaction as between the parties was lawful and the defendants not guilty, under either count of the indictment.

VIII.

"The jury are instructed that it is not unlawful for two or more parties to come to terms of agreement between themselves to interest and enlist with them another person in the conduct and furtherance of their business or undertaking; or, if such other person has explained to him and understands the means and process to be used in the accomplishment of the proposition in which he is about to engage, and assents to, and assumes the chances of gain to himself, in engaging with such others in the furtherance of such enterprise, then there is no such false or fraudulent representations or statements made to him as will constitute the offense of conspiracy to cheat and defraud him of his money or property; and if you find from the evidence that the defendant Howard explained to the witness Gar-

rett a scheme which he proposed to Garrett to assist in the furtherance of, and to which scheme the witness Garrett then gave his assent and approval, undertook and agreed upon terms of compensation then proposed to him, to engage in the furtherance of, in connection with Howard, and the said defendants, in the hope thereby of gain and profit to himself, then you will find the defendants 'not guilty.'

IX.

"The court instructs the jury as a matter of law that it is not unlawful or criminal for two or more persons to come to terms
182 and agree together to interest and induce another person to become interested and promote conjointly with them any matter or thing not in itself unlawful, and if you find therefore from the evidence that the defendants, through the defendant Howard, represented and proposed to the witness Garrett a scheme, project or business which as explained was apparently lawful and proposed to engage the services of the witness Garrett in the promotion and furtherance thereof upon terms profitable to the said Garrett that they had a lawful right to do so, and if you further find from the evidence that the said Garrett gave his voluntary and free assent to the promotion and carrying out of the project for business thus proposed to him, you will find the defendants 'not guilty.'

X.

"The jury are instructed that it is not unlawful for two or more persons to agree together to interest with them another person in the promotion and carrying out of any enterprise of advantage and profit to such person or to hire such other person on terms of compensation to assist them in the transaction of business, and if you therefore find from the evidence that two or more of the defendants explained to the witness Garrett the nature of the business in which they desired his services, and that fully understanding the matter, the witness Garrett undertook and agreed to serve the defendants in the promotion and furtherance of the enterprise and business thus explained to him upon terms of profit and advantage to himself, then, as a matter of law, he had a right so to contract, and in doing so assumed all the risks and burdens incident to such contract, and if you so find and believe from the evidence in this case, you shall find the defendant 'not guilty.'

183 XI.

"The court instructs the jury that if you find from the evidence that the witness Garrett had explained to him by any one of the defendants the nature and object of the business they were intending to promote regarding which they sought and desired his services, and that having the matter so explained to him, he undertook and agreed upon terms of advantage and profit to himself to join the enterprise, business or undertaking of the defendants, and which was thus explained to him, then you will find, as a matter of law, that the defendants had a perfect right so to interest and engage with

them the witness Garrett in its furtherance and promotion, and that if he came to terms and agreed with any one or more of the defendants to become so interested with them in the promotion and furtherance of their enterprise, that as a matter of law, he had a right so to do, and they had a right to so engage him and that he with them assumed and undertook all the hazard and chances of the future of such enterprise, and you should therefore find the defendants 'not guilty.'

XII.

"The jury are instructed, as a matter of law, that parties have a right to seek each other out, contract and agree with each other with respect to any business or undertaking looking to the mutual betterment of their condition; and if you therefore find from the evidence that any one or more of the defendants sought out and explained to the witness Garrett the nature of the business in which they desired his assistance to promote and upon the same being explained to him the witness Garrett assented thereto,
184 and agreed in the hope of profit to himself to embark therein and join one or more of the defendants in the promotion thereof, then you will find, as a matter of law, that the transaction between the parties was lawful, and you should find the defendants 'not guilty.'

XIII.

"The indictment in this case charges the defendants with a conspiracy to falsely cheat and defraud Paul Garrett out of his money by what is known to the law as 'false pretense,' and a false pretense is a false representation by one person to another of a subsisting fact which is calculated to deceive the person to whom the representation is made, and which actually does deceive him, in consequence of which deceit he parts with his property, so that before the jury can convict them they must find the fact to be that the defendants fraudulently combined and conspired with each other to make a false representation of some subsisting fact to Paul Garrett, the falseness of which was unknown to Paul Garrett, and which Paul Garrett believed to be true, and in case you do not find this to be the fact it will be your duty to return a verdict of 'not guilty.'

XIV.

"The defendants are presumed to be innocent of all the charges against them until they are proven guilty by evidence which satisfies you beyond a reasonable doubt of their guilt; and this presumption of innocence is raised by law in their favor and is to be regarded by the jury in this case as a matter of evidence, to the benefit of which the defendants are entitled.
185 "This presumption of innocence is evidence in favor of the defendants introduced by the law itself in their behalf and it continues in their favor until the end, unless it is overcome by such competent proof as satisfies the jury beyond a reasonable doubt of the defendants' guilt.

"Unless, therefore, this presumption of the defendants' innocence, which is evidence introduced by the law in their behalf in this case and which must be considered by the jury as evidence of their innocence, is overcome by competent proof which establishes the defendants' guilt in that degree and to that extent which removes from the mind of the jury all reasonable doubt of their guilt, it will be the duty of the jury to return a verdict of 'not guilty.'

XVII.

"As to a reasonable doubt, the court instructs you that in this particular case, if upon considering all the evidence, you can say that in their acts and doings as found by you, the defendants were actuated by any other motive than to cheat or defraud Paul Garrett, and to obtain from him any money or other thing of value, as for example, if their object and intention was to induce Paul Garrett to join in with them in an effort to cheat or defraud some one else then it would be your duty to adopt that theory or that motive and that would be a reasonable doubt, and it would be your duty to return a verdict of 'not guilty,' and in passing upon this question it is proper that you should consider, if you find the facts so to be, that the defendants never asked Paul Garrett to advance any money; that Howard paid his expenses to come to Greensboro; that Howard told him that he would pay his expenses to go to Philadelphia and attend to their business for them and would share with him any profits that they might make.

186 XVIII.

"If the jury shall not have removed from their minds all reasonable doubt of the defendants' wrongful and unlawful intent to cheat and defraud Paul Garrett by reason of such acts and things done by them, then it would be the duty of the jury to return a verdict of 'not guilty.'

XIX.

"While it is not necessary, in order to convict the defendants in this case, that they should have actually obtained from Paul Garrett any money or other thing of value by false and fraudulent representations, still before the jury can convict, they must be satisfied beyond a reasonable doubt, as above explained, that there was an unlawful conspiracy and agreement between the defendants to endeavor by false and fraudulent representations to obtain money from him, and the jury must further find that the false and fraudulent representations agreed to be used by the defendants must have been a false representation of a subsisting fact such as was calculated to deceive a man of reasonable intelligence and information and actually did deceive Paul Garrett.

XX.

"A mere false affirmation of the value of any article is not indictable and the pretense to be criminally false, must be of a past or subsisting fact, capable of deceiving a person of ordinary caution or

prudence; so that your inquiry will be, was Paul Garrett a man of ordinary caution and prudence, such as the representation of Howard was capable of deceiving; and in passing upon this question
187 it is your duty to consider whether it did deceive him; consider his demeanor on the witness stand; his telegram to the chief of police in Richmond; his letter to Patterson; the fact that he admits he sent Mims to Greensboro before he came himself; his instructions to Mims, and his conversation with Patterson after his arrival in Greensboro; the fact that he says he was satisfied Patterson and Mims would be at the meeting place between him and the defendants Howard and Daley for his protection; and the fact that he testifies that as Howard left his office in Weldon he told his clerks to look out of the window if they wanted to see a gold-brick man.

XXI.

"If the jury shall find from the evidence, at the time Paul Garrett agreed with Howard in Weldon to attend to the business for him and his alleged partner of selling their gold and aiding him in the purchase of machinery to work the mine, he knew or had reason to believe that a fraud was intended, and he came to Greensboro ostensibly to further that fraud, but really for the purpose of trapping the defendants that he might have them arrested and that he was not defrauded or cheated out of any money or other thing of value by the defendants or by the false representations agreed to be made by them, then the court instructs you that no crime has been committed and it will be your duty to return a verdict of 'not guilty,' and in passing upon the question of the contract and agreement between Howard and Garrett, it is your duty to consider the two telegrams which were written by Garrett himself and given by him to Howard to be sent back to him (Garrett) and also to consider the fact that Howard gave Garrett $10 and agreed to pay all expenses which that
188 sum did not cover; and in passing upon the question of the knowledge and belief of Garrett, you will consider the telegram sent by him to the chief of police in Richmond and the letter written by him to the attorney general in Richmond, and the letter written by him to A. C. Patterson, and the sending by him of a Mr. Mims of Weldon to Greensboro, and such other acts done by him looking to the apprehension and arrest of the defendants.

XXII.

"The court further instructs the jury that upon the evidence adduced in this case the defendants, as a matter of law, are not guilty, and the jury should so find, and return their verdict accordingly."

32nd ex. That each and every of the several said special instructions asked by the defendants, excepting the
32d excep. eighteenth (XVIII) thereof was refused by the court as asked, except as given in the general charge, to which refusal and action of the court in not giving the same to the jury the defendants then and there duly objected and then and there took and saved their exception.

The defendants then and there also objected to the court's failure to give to the jury each and every one of the said special instructions as asked, and to note on each thereof the reasons for giving or refusing the same, which objection by defendants was overruled by the court, to which ruling defendants then and there duly excepted.

33rd ex.

The defendants then and there objected to the court's refusal to give instruction No. XIV as asked by defendants and by eliminating therefrom the words

189 "and is to be regarded by the jury in this case as a matter of evidence to the benefits of which the defendants are entitled,"

and in giving said instructions so modified; which objection was overruled by the court, to which ruling of the court defendants then and there excepted.

34th ex.

And defendants then and there also objected to the court's action in eliminating from instruction XIX, as asked by the defendants, the words, "and the jury must further find that the false and fraudulent representation agreed to be used by defendants must have been a false representation of a subsisting fact such as was calculated to deceive a man of reasonable intelligence and information and actually did deceive Paul Garrett," and in giving the same so modified. Which objection was overruled by the court, to which ruling defendants then and there excepted.

35th ex.

That at the conclusion of the argument and over the objection of the defendants, the court gave to the jury his instructions and charge of law as follows, to wit:

"*Charge by Court.*

"NORTH CAROLINA, *Guilford County.*

"STATE
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley. } Judge's Charge.

"Gentlemen of the jury:

"The prisoners are on trial upon an indictment in which they are charged with a conspiracy to cheat and defraud one Paul
190 Garrett, a citizen of your State out of his monies, goods and wares. To this indictment the prisoners have pleaded 'Not guilty,' and thus an issue has been raised between the State and the prisoners as to their guilt or innocence, or the guilt or innocence of either of them.

"During the course of this trial much has been said to you by counsel for the State and for the defendants as to the law that should govern the trial of the case and they have read extensively from

legal authorities to you commenting upon the same and giving their views of the law applicable to this case. As you have observed, and to which the court again calls your attention, there seems to be an irreconcilable conflict of opinion as to most of the views presented and insisted upon by counsel representing the respective sides of this controversy; that is to say, between counsel for the State, and those for the defendants. This being so it becomes my duty to say to you that however much you may have been impressed with the views of any of the attorneys in the case either for the State or the defendants, as to the law which should govern this trial still you are to take the law governing it and upon which your verdict is to be founded from the court. Where the views of counsel for the State or for the defendants conform to the views of the court, the jury can adopt them, but where in conflict with the views of the court the jury should disregard them and be governed by the instructions of the court. This is not only your sworn duty, gentlemen, but it is the safest course to pursue if you are moved by a conscientious desire to respond to the high duty of jurymen, as I feel sure you do. By pursuing this course no possible wrong can be done the defendants as an error committed by the court in instructing you upon the law of this case can, if the defendants feel
191 aggrieved thereby, be corrected on appeal to our supreme court. Now, gentlemen, observing the instructions that you will take the law governing this trial from the court, let us come to the consideration of the charge against the defendants, that of a conspiracy to cheat and defraud Paul Garrett of his monies, goods and wares, as alleged in the bill of indictment. Conspiracy, gentlemen, is no new offense under the law. Its existence can be traced back centuries prior to our Independence and such eminent ancient law-writers as Coke and Hawk and others refer in their works to the existence of this crime prior to the passage of the statute 33, Edward 1st, de conspiratoribus, which statute has been commented upon by counsel for the defendants. Law-writers upon the subject of conspiracy generally agree that the statute referred to was only declaratory of the common law to the extent of the crimes enumerated in the act leaving the common law as applicable to all other forms of conspiracy known to the law. Not only *has* the courts of England acted upon this interpretation of the law, but every State in this Union where the common law prevails, so far as the court is advised, has acted upon and upheld this interpretation of the law of conspiracy. To do otherwise in States that rely upon the common law and which have no statute broad enough to cover all forms of conspiracy would be to say that many objectionable and dangerous conspiracies could be formed and their ends consummated, and yet the law be impotent and powerless to prevent or punish such. The correctness or incorrectness of these general views as to the law of conspiracy, however, does not effect the law of this State on the subject for interpreted as it has been by the highest courts for nearly or quite a century we know that a criminal conspiracy is indictable in this State as a common-law offense. Then acting upon this
192 view of the law let us inquire as to what constitutes a criminal or indictable conspiracy under the laws of this State.

"'To constitute an indictable conspiracy under the law of this State there must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.' You will observe from this definition which I have given you of conspiracy that the offense consists of the unlawful combination of the conspirators, and that the crime is completed when this is shown. Hence, if two or more persons combine to rob or to cheat another, and this fact can be established the offense is complete and the fact that the consummation of the end in view is never effected is no defense to the charge, the carrying out of the purpose only being in the nature of an aggravation of the crime.

"This, gentlemen, brings us to the immediate consideration of the charge against the defendants as preferred in the bill of indictment; that is, did the defendants named in the indictment or any two of them combine and conspire to cheat and defraud Paul Garrett out of his money or property as alleged in the indictment, if so, then such as so conspired are 'guilty,' and this is so, although the purpose in view at the time of the formation of the combination was never carried out or consummated. The defendants have pleaded to this indictment and say that they are 'not guilty,' and that upon the evidence offered by the State they are entitled to an acquittal at your hands.

"To enable you to correctly and intelligently determine this issue, it is proper that I should instruct you as to some rules of law
193 as to the application of evidence in cases of this nature. Where the State asks a conviction of any one charged with the commission of crime it must satisfy the jury from the evidence in the case of the guilt of the accused beyond a reasonable doubt, and if it fails to do so the jury should acquit, but if the evidence so satisfies then the jury should convict; this rule of law applies to the case at bar, and if upon consideration of the evidence offered by the State, it satisfies you of the guilt of the defendants or any two of them beyond a reasonable doubt, then your verdict should be 'guilty,' as to such, naming them; otherwise if you are not so satisfied, that is to say, your verdict should be 'not guilty.'

"Now, what is a reasonable doubt? While there is no set formula that is used defining it, it may be defined for the purpose of this charge as being such a doubt as would appeal to and be supported by the reasoning of a man of ordinary intelligence, or as has perhaps been more aptly expressed by our supreme court, as meaning that after a consideration of all the evidence with all the light derived from the argument of counsel and the instructions of the court, the jury ought not to convict unless they find that their minds have been involuntarily led to the conviction that the prisoner was 'guilty,' as charged.

"Now, upon the consideration of the evidence, the argument of counsel and the charge of the court in this case say whether or not you are satisfied beyond a reasonable doubt of the guilt of the defendants or any two of them, and if so, your verdict as to such

should be guilty, naming them; otherwise, if not so satisfied, that is 'not guilty' as to any or all of the defendants, as you may find.

"Indictable conspiracies from their very nature are generally formed secretly, and it is therefore difficult to prove their
194 existence by direct evidence. The law, therefore, allows the proof of such offenses to be shown from circumstantial evidence, and from the acts and declarations of the conspirators, where there is proof of the combination or conspiracy.

"It is a rule of law well established that all who engage in a conspiracy, as well as those who participate after it is formed as those with whom it originates, are equally liable and the acts and declarations of each in furtherance of the common illegal design are admissible against all. Every one who enters into a design, in other words a conspiracy, is equally deemed in law a party to every act which may afterwards be done by any of the others in furtherance of such common design. Take all the facts and circumstances disclosed by the evidence and if they satisfy you beyond a reasonable doubt of the existence of the conspiracy charged against the defendants or any two of them then the act of any one of them is the act of all, and of each of the conspirators.

"Now, gentlemen, does the evidence in this case satisfy you by the rule that I have heretofore announced of the guilt of the defendants or any two of them? If so, your verdict will be 'guilty,' as to such, naming them. Much has been said during the course of this trial as to what is an indictable conspiracy and what is not an indictable conspiracy. I have defined to you what constitutes an indictable conspiracy and you will readily understand that such is not the ordinary business combination agreed upon and entered into by persons for legitimate ends and aims. A combination of men for the purpose of doing any kind of business authorized and permitted under the laws does not constitute an indictable
195 offense, but such combinations are highly useful and are protected and encouraged by the law.

"Reference has been made by counsel for the defense to the testimony of the witness Garrett and his course in connection with the apprehension and arrest of the defendants in connection with this charge and has been made the subject of comment and criticism. The court therefore takes occasion to say that if the evidence as disclosed by the testimony of Garrett satisfies you that he acted in the matter either for the purpose of detecting the defendants, having suspected them of an intention to cheat and defraud him, or if he acted under the belief that the representations and inducements held out to him were honest and true, and that in consequence of either of these beliefs he came to Greensboro to ascertain the truth of such impressions then he acted within the provisions of the law, and his course is not the proper subject of criticism or adverse comment. The court in this connection charges you that there is no evidence that in any way connects him with the defendants in any charge of conspiracy to violate the law. If he comes to detect and apprehend the defendants in the commission of an intended crime his course is

not only proper but is commendable. If he came under the impression that the business transaction was a legitimate and honest one by means of which he would be able to acquire legitimate and honest profit then he had a right to come for such purpose, and it would not be a subject of criticism.

"Now, gentlemen, in the trial of this cause the court admonishes you to divest yourselves of any possible feeling or prejudice which you might have against the defendants as well as any sym-
196 pathy that you might entertain for them on account of their misfortune, and try this case upon the law and the evidence as the court has endeavored to lay it down to you. When you do this you have responded to the high responsibilities which rest upon you as jurors. It matters not whether your verdict accords with public sentiment or not. You are supposed to be indifferent to any such influences and for such to influence you would be a failure to perform your duty. I need not say to you that the offense with which the defendants are charged is a grave one under the law, and if guilty they should be convicted, but while this is true they are entitled under the constitution and laws of your State to a fair and honest trial at your hands, and I feel sure that you will give them such. Reason together, gentlemen, in the spirit of men who are acting upon their oaths to arrive at a just and fair verdict. Guard yourselves against any disposition to act with stubbornness one against the other in arriving at a verdict, and thus you will be the better enabled to arrive at a just and fair verdict. If you find the defendants 'guilty,' then in response to the inquiry from the clerk as to what is your verdict you will say 'guilty,' as to all the defendants or as to any two of them, or you will say 'not guilty,' — to all of them or any one of them. In the event that you should find only two of the defendants 'guilty,' in response to your verdict you should designate them by name as appears in the bill of indictment.

"You will now retire and give the case such consideration as it deserves, and when you have arrived at a verdict you will come back into the court-room, and the court will be prepared to receive you.

(Signed) "COUNCIL JUDGE."

36th excep. 197 36th ex. To which instruction and charge of law by the court so given in writing to the jury, the defendants then and there duly excepted.

Verdict of guilty. The jury thereupon retired and returned its verdict of "guilty" against all three of the defendants.

37th ex. The defendants thereupon moved to set the verdict of the jury aside and for a new trial in said
37th excep. cause, which motion of the defendants was
Motion new trial. then and there overruled by the court, to which ruling of the court defendants then and there, by their counsel, duly excepted.

The defendants thereupon moved the court in arrest of judgment

upon the verdict, which motion in arrest the court then and there overruled; to which ruling of the court the defendants then and there excepted.

38th excep. Motion in arrest. Sentence.

The court thereupon sentenced J. J. Howard, alias Frank Thompson, to imprisonment in the State penitentiary for ten (10) years; H. D. Hawley, to imprisonment in the State penitentiary for ten (10) years, and A. L. Daley, alias Gonez Bono, to imprisonment in the State penitentiary for seven (7) years to which ruling of the court and sentence, the defendants, by their counsel, then and there objected.

39th excep. 39th ex. The objection was overruled by the court and the defendants excepted.

The defendants, by their counsel, then and there prayed an appeal from the said judgment to the supreme court of North Carolina. Notice of appeal was given and accepted in open court and an appeal bond in the sum of fifty dollars ($50) was adjudged sufficient, and the defendant J. L. Howard held in a bond of five thousand dollars ($5,000), the defendant H. D. Hawley held in a bond of five thousand dollars ($5,000), the defendant Daley in a bond of three thousand dollars ($3,000), pending the appeal. The defendants then filed the affidavit set out in the record proper, as required by section 1235, and his honor granted the order set out in the record proper allowing the defendants to appeal *in forma pauperis*.

Prayer for appeal bond.

Bond in appeal.

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Fifty days to defds. and thirty to solicitor for appeal.

By consent the defendants were allowed fifty (50) days within which to prepare their case on appeal and the solicitor for the State allowed thirty (30) days thereafter in which to prepare his counter-statement.

The defendants objected to the bond fixed by the court for their appearance pending their appeal, upon the ground that it was excessive and unreasonable and duly excepted to the overruling of said objection.

Stipulation for record. Leave defds. appeal as poor persons.

It is agreed that the foregoing statement of the case shall constitute the case on appeal to the supreme court. The clerk will send up the judgment and sentence of the court, the affidavit of defendants for appeal *in forma pauperis* and the order of the court granting such appeal and all other parts of the record not embraced in this statement, including bill of indictment and endorsements thereon.

A. L. BROOKS, *Solicitor.*
L. A. GILMORE,
BYNUM & BYNUM,
JOHN A. BARINGER,
Attorneys for Defendants.

199 *Assignments of Error.*

STATE OF NORTH CAROLINA,
Guilford County.

In the Superior Court, June Term, 1901.

STATE OF NORTH CAROLINA
vs.
J. L. HOWARD, alias FRANK THOMPSON; A. L. Daley, alias Gonez Bono, and H. D. Hawley. } Assignment of Errors.

Come now J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, appellants, in connection with their appeal and make the following assignment of errors, which they aver occurred upon the trial of the said cause, to wit:

I.

The court erred in refusing the motion of the defendants that the prosecution be required to furnish them a bill of particulars as set out in their motion.

II.

The court erred in overruling the motion of the defendants, which appears in the record, to quash the indictment:

1. Because the said indictment and matters therein contained are not sufficient in law to warrant the judgment against them or to warrant a conviction of them of any crime.

2. The allegations in the indictment and every count thereof do not constitute a crime under the ordinance of conspirators
200 made and enacted by King Edward the First and his counsel in the 33rd year A. D. 1305 of his reign, or by any statutes of England since that date, nor under any common law in force in the State of North Carolina at the date of the said alleged offense.

3. Because the allegations in the said indictment and in each and every count thereof do not constitute a crime under the statute of North Carolina in force at the date of the said alleged offense.

4. Because the common law with respect to conspiracies has been abrogated by its constitution and legislative enactments on the subject of conspiracy, to wit, the acts of 1868 and 1879, the Code of 1883, sections 974 and 1107, by neither of which said acts is the crime charged cognizable.

5. Because the alleged warrant upon which the defendants were arrested and held for their appearance at the June term of said court, as well as the indictment against them in this action, do not constitute due process of law within the meaning of the 14th article of the amendment to the Constitution of the United States.

6. Because the alleged crime sought to be charged against the de-

fendants under the indictment is not cognizable or punishable, either under the common law or the statutes of North Carolina.

7. Because, there being no statute of the State of North Carolina nor any common law in force therein, authorizing the indictment or denouncing punishment for the said alleged crime, the indictment, arrest, trial, conviction and punishment of the defendants is contrary to the 14th article of amendment to the Constitution of the United States, in this that it is not due process of law; it denies the defendants the equal protection of the laws and abridges
201 their privileges and immunities as citizens of the United States, the defendants being citizens thereof.

8. Because the said indictment and every count thereof is insufficient in this: That the first count thereof does not inform the defendants of the nature and cause of the accusation against them; that the certain pretenses, subtle means and devices are not therein set out and described; nor the cheat or fraud described; nor the amount of the money intended to be obtained or the value thereof; nor what the goods and chattels were or that they were of any value. That the second count thereof does not inform the defendants of the nature and the cause of the accusation against them nor state or show sufficient facts as means or ends to constitute a crime; and that the third count thereof does not inform the defendants of the nature and cause of the accusation against them, nor what the intended cheat and fraud was, nor the amount of the money so intended to be obtained, nor that it was of any value, nor what the goods, chattels or property were, nor the amount thereof, or that they were of any value, nor state or show sufficient facts as means or end to constitute a crime.

9. Because the said indictment and each and every count thereof are otherwise so informal and general, indefinite and uncertain that no plea of former conviction or acquittal could be pleaded to a second prosecution.

III.

The court erred to the prejudice and injury of the defendants by the remarks of his honor when he refused to exclude the witness Garrett and the sheriff of the county from the court-room on motion of the defendants to separate the witnesses, in that his honor
202 said in the presence of the jury that he "would not exclude from the court-room either the high sheriff of the county or his assistant deputy sheriff, or the prosecuting witness Garrett. That it was a matter that appealed to the discretion of the court and that the high character of the citizens involved forbade the idea that either would be influenced by the testimony of the other." These remarks of his honor were made before the jury was passed upon by either the State or defendants, but when the regular panel was present in the court-room in the jury-box.

IV.

The court erred in permitting the witness Garrett to testify as to transactions and conversations with the defendant Howard in Wel-

don, Halifax county, N. C., March 20, 1901, and to Howard's declarations in the absence of the other two defendants before the conspiracy had been established as set forth in the 4th and 5th exceptions.

V.

The court erred in further admitting the testimony of the witness Garrett as to the conversation between him and the defendant Howard, alias Thompson, in Weldon, Halifax county, N. C., and with respect to the gold mine owned or supposed to be owned by the said defendant Howard, alias Thompson, or about its supposed product, or concerning the alleged Indian in the woods, etc., the said witness Garrett having immediately theretofore testified as follows concerning the said conversation with Howard: "I walked into the office as he (Howard) turned the corner and I touched the two young men on the shoulder. I did not want the stenographer to hear. I said,
'If you want to see a genuine gold-brick man, look out of
203 the window, quick;' they both ran to the window and I said,
'If he is not one I never saw one.' I rang the 'phone and called up the revenue officer at Littleton, N. C., whom I know personally, and under the suspicion that the bill I had received from Howard was a counterfeit bill, I told him I would like to have him come down that afternoon on the next train; I wanted to see him on a matter of importance. Thompson was then crossing the bridge."

VI.

The court erred in permitting the witness Garrett to testify as to the package or the contents of the package which the defendant Howard offered to show the witness in the woods near Greensboro at the time the defendants Howard and Daley were arrested, and to the reception in evidence of the said package and its contents.

VII.

The court erred in further permitting the witness Garrett to testify as to the acts, declarations and conduct of the defendants Howard and Daley after they had been arrested in the woods by Patterson, Jordan and their posse.

VIII.

The court erred in permitting the witness Garrett to testify as to the acts and declarations of the defendant Howard at and after the time of his arrest in the woods near Greensboro, when Garrett and Officer Patterson and others had him handcuffed and covered with their guns.

IX.

The court erred in permitting the witness Garrett to testify as to what Officer Patterson did to the defendant Daley at and after
204 the time of his arrest in the woods near Greensboro, and to the introduction of a card alleged to bear the name of the

defendant Hawley, and to the fact that the said card was found by the witness Daniel on the ground near the feet of Howard after the arrest.

XI.

The court erred in permitting the witness Garrett to testify on cross-examination as to what occurred in the woods near Greensboro after the arrest of the defendants Howard and Daley.

XII.

The court erred in refusing to strike out the evidence of the witness Garrett as to the cases alleged to have been found in the woods near the defendants Howard and Daley at the time of their arrest.

XIII.

The court erred in permitting the witness Garrett to testify as to what they found in the defendant Hawley's possession in the Guilford hotel in Greensboro or what was said to him by the sheriff or any one of the witnesses present in the room in the hotel while under arrest.

XIV.

The court erred in refusing to strike out and exclude all the evidence of the witness Garrett as to the acts and disclosures of, or conversations with, any one of the defendants in the absence of the others, and any and all evidence of the said Garrett relative
205 to the property belonging to any one or more of the defendants, which was by the witness discovered and investigated subsequent to the arrest of the defendants in the woods near Greensboro.

XV.

The court erred in permitting the witness W. J. Weatherly to testify as to what was said and done by him and the other members of the posse and the defendants Howard and Daley subsequent to the arrest of the defendants Howard and Daley in the woods near Greensboro.

XVI.

The court erred in permitting the witness Garland Daniel to testify as to a card found at the feet of the defendant Howard, alias Thompson, at the time the parties were arrested in the woods near Greensboro, and the court erred in permitting the introduction of the said card in the evidence.

XVII.

The court erred in refusing to strike out the evidence of the witness Daniel relative to his own acts or conduct, or the appearance of the defendant Hawley, subsequent to the arrest of either of the defendants Howard and Daley in the woods near Greensboro.

XVIII.

During the cross-examination of the witness Daniel, he was asked by defendants' counsel this question, "What is exclusively used in an assayer's outfit that is not used in anything else?" And he answered, "I do not know that you could find anything that could not be used for something else;" and his honor thereupon
206 refused to permit the further examination of the witness as to what constitutes a complete assayer's outfit, for the reason that the witness had stated that he did not know what constituted a complete assayer's outfit. In this the defendants submit that the court erred to their injury and prejudice and they assign the same for error.

XIX.

The court erred in permitting the State's witness Henry Whitfield to testify as to a conversation between himself and the defendant Daley in the absence of the defendants Howard and Hawley in the Guilford hotel, in March, 1901.

XX.

The court erred in permitting the State's witness, Dr. J. P. Turner, coroner of Guilford county, to testify concerning the trunk and its contents found in the room of one of the defendants after the arrest and incarceration of the defendants, and to the introduction of the said trunk and its contents.

XXI.

That the court erred in permitting Messrs. King & Kimball, who were retained by the witness, Paul Garrett, to prosecute the defendants in a civil suit, growing out of the transaction between them and Garrett and here being prosecuted criminally, to appear with and assist the prosecution of the defendants being retained so to do by Paul Garrett.

207 XXII.

The court erred in permitting the State's witness, John Thompson, to testify that he had made an analysis of the borings taken from the alleged gold bricks or bars and as to the result of the said analysis, and the court erred in receiving in evidence the said alleged gold bricks or bars and the cloths in which they were bound or wrapped.

XXIII.

At the close of the evidence offered by the State, the solicitor for the State elected to rely upon the first count in the indictment and entered a *nolle prosequi* as to the second and third counts, whereupon the defendants through their counsel, informed the court that they would offer no evidence for the defendants, and moved the court to instruct the jury that upon the evidence adduced in the cause the defendants, as a matter of law, were not guilty, and the jury should

so find and return their verdict accordingly. This motion was refused and to the ruling of the court therein, the defendants assign error.

XXIV.

The court erred in refusing to give the instructions prayed for by the attorneys and counsel for the defendants in the following instances:

1. To constitute an indictable conspiracy there must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. This definition of a conspiracy being applied to the
208 case now before the jury means that the conspiracy alleged to have been entered into by the defendants must have been done with the intent either to cheat or defraud or to rob an innocent person, who did not know of its existence, of his property, or to deprive an innocent person of his lawful rights; so that if the jury find that Paul Garrett, the party whom it is charged in the bill of indictment the defendants conspired to cheat or rob of his property, entered into the contract as alleged with Howard with the knowledge or belief on his part that it was fraud that was attempted to be perpetrated upon him, then I charge you that he is not such an innocent person as is contemplated by law, and the defendants would not be guilty, even although the alleged combination was to cheat or defraud Paul Garrett.

2. The court instructs the jury that the conspiracy charged against the defendants in the first count of the indictment herein consists in its criminality under the law in the means alleged to have been agreed to be employed by the defendants in the obtaining of the money of one Paul Garrett, and that as to such count it devolves upon the State in the first instance to prove by the evidence beyond a reasonable doubt that the defendants had actually agreed between themselves upon the means charged in said count to obtain of the witness Garrett his money, that is, secretly and with deceit and fraudulent intent and by false pretenses, subtle means and devices of a subsisting fact, the truth of which was unknown to the witness Garrett and which was intended to and capable of deceiving a person of ordinary prudence, exercising at the time ordinary care; and unless you so find and believe from the evidence in this case you shall acquit the defendants.

3. The court instructs the jury that the conspiracy charged against the defendants in the first count of the indictments consists
209 in its criminality under the law in the means therein alleged by the State to have been agreed upon by the defendants whereby to obtain the money of one Paul Garrett, and that in such case the burden is upon the State to prove beyond a reasonable doubt every essential element of the offence thus charged against the defendants and show that the means there charged were actually agreed to be employed by the defendants as a means of obtaining from the witness Paul Garrett his money with the intent wickedly

and maliciously to defraud him of it; and unless you find from the evidence that such was the agreement between the defendants so to cheat and defraud the witness Paul Garrett of his money, then you will find the defendants not guilty; and the jury are further instructed that in considering the evidence adduced before you by the State in this cause as applicable to the first count of said indictment, you should take into consideration the situation of the parties, their acquaintance with each other, of the probability or improbability of the story related by the defendant Howard to the witness Garrett at Weldon, the impression, if any, it made upon his mind, the assent of Garrett thereto and his knowledge of the scope and effect of the agreement assented to, and its nature and his participation therein, and if from such impression he was likely to be or was deceived thereby into the belief of the truth thereof, and whether the same was calculated to and capable of inducing him to part with his money to the defendants; and if you find from the evidence that such story as was then related by Howard to Garrett, that he, in the exercise of ordinary prudence, should have known or did know was false, and that knowing its falsity he then and thereafter encouraged by his words and conduct the defendant Howard to believe that he, Garrett, believed in
210 such story, and on such pretense advised and encouraged the defendant Howard into taking further steps of an apparent attempt to obtain the money of Garrett by and through the means suggested in the story related to him by the defendant Howard, and that in pursuance of such statements and requests by Garrett the defendant Howard came to the city of Greensboro in Guilford county and prepared himself with his codefendant, A. L. Daley, to show the witness Garrett the property in question and under inducements laid and held out by Garrett to the defendant Howard did transmit to him, Garrett, a telegram prepared and written by the witness Garrett, addressed to himself, whereupon the witness Garrett came to Greensboro, and with the defendant Howard went to see the property so situated and described to him; and that arriving at the place where the defendant Daley, disguised as an Indian, and the property so spoken of, was, and that while weighing and examining it, the witness and a sheriff's posse arrested the defendants Howard and Daley; in that event the court instructs you as a matter of law that the confederation or agreement between the defendants to so exhibit to him the said property was not an unlawful or criminal conspiracy, and this without respect as to what motive the defendants had or may have had in so arranging to exhibit to the witness Garrett the property in question, and that the acts, conduct and agreement of the defendants in this respect were not criminal under the law, and you should find them "not guilty."

4. The court instructs the jury that if you find from the evidence that about March 20th, 1901, the defendant Howard called upon the witness Garrett at his place of business in the town of Weldon and related to him a story respecting his, the defendant Howard's
211 ownership of a mining property and gold taken therefrom, and of the relationship of a former partner by the name of

Garrett whom he was seeking for the purpose of enlisting him in the business of developing said mining property, and disposing of the product thereof, then stated to be in the possession of an Indian at the time being in the city of Greensboro, and that from the relating of such story by the defendant Howard, the witness Garrett either knew, or in the exercise of ordinary care, precaution and prudence, might or should have known, the same was false and related to him for the purpose of obtaining and defrauding him of his money, and that knowing or believing it at the time to be so he, the witness Garrett, falsely pretended belief of and confidence in, the story so related to him, and that it was intended to cheat and defraud him of his money, and that so believing, he, Garrett, encouraged and advised the defendant Howard into taking further steps with respect to developing such plot as was disclosed in the story related by Howard to the witness Garrett, and that Garrett aided the defendant Howard in arranging the details and creating the situation of exhibiting to the witness Garrett the property in question at or near the city of Greensboro, the court instructs you as a matter of law that nothing said or done or agreement entered into by or between any two or more of the defendants pertaining to the proposed transaction with the witness Garrett subsequent to his knowledge or belief in the falsity of the story related to him by Howard, are acts and agreements between the parties of which the witness Garrett may in law not be heard to complain, and that the transaction which occurred subsequent thereto concerning which the witness Garrett had participated in arranging for, was not criminal; and this irrespective of what was or might have been
212 the intention or motive between the defendants in carrying out the details of such arrangements or the representations subsequently made to him by any one or more of the defendants with respect to the quality or the condition of the property in question or what they intended to do with the same, and you should find the defendants "not guilty."

5. The jury are instructed that if they find from the evidence in the case that at the time the witness Garrett was approached by the defendant Howard at Weldon or during the conversations and transactions there had between them the witness Garrett then and there became satisfied and knew that the defendant Howard was proposing to him a scheme which was patently and evidently a fraud and a sham, and that knowing this to be true the said witness Garrett for the purpose of gain, or taking his chances upon making money out of such scheme and plan as then proposed by the said defendant Howard, willingly and voluntarily entered into the same for such purpose and encouraging or in any way furthering the said enterprise, scheme or plan so known to him to be false and fraudulent, and then and there in any way directed or advised the said Howard how to proceed, or agreed to accept the proposition then and there advanced and proposed by the defendant Howard to him, the said Garrett, and undertook and agreed to become interested therein as a partner or shareholder for the purpose of furthering the said enterprise, scheme or plan with the hope of gain to himself, and that the

said Howard then and there distinctly told the said Garrett that the object of the said enterprise, plan or scheme did not contemplate the advancement, contribution or investment of any money whatever by the said Garrett, but that all he, the said Garrett, was expected to do in connection with the said enterprise, scheme or plan was
213 that he, the said Garrett, should manage and direct the same, and that the said Garrett with all these facts before him willingly and voluntarily assented thereto and advised the said Howard how he should further proceed in the matter, and that Howard thereafter acting in obedience to the suggestions of the said Garrett came to Greensboro, and while here and promising him full compensation for his services while engaged in the furtherance of the said enterprise, scheme or plan, and that the said Garrett, as a matter of fact, was never cheated or defrauded or robbed of a cent by the defendants or any one of them, but in the furtherance of the said scheme or plan, he, the said Garrett, had accepted the money of the said Howard to cover expenses of his said trip to Greensboro in furtherance of said plan or scheme, then and in that event there would be no criminal conspiracy as charged in the indictment, but the defendants as a matter of law would not be guilty and it is the duty of the jury so to find.

6. If the jury should find from the evidence that the prosecuting witness, Paul Garrett, in pursuance of an arrangement voluntarily entered into by him with the defendant Howard at Weldon, came to the city of Greensboro in the furtherance of an enterprise, the details of which were fully made known to him by the said Howard at Weldon, and assented to by the said Garrett, and out of which the said Garrett was to receive compensation equal to that of the said Howard and his copartner, A. L. Daley, and that the expenses of the said Garrett were paid in advance, and it was further made known to him at Weldon and at Greensboro after his arrival here that no money was expected from him but he was simply to take charge of the business and manage it, as one possessing superior intelli-
214 gence and capacity, and that he gave his full and free assent to the same, and that upon his arrival in Greensboro, he, and the said Howard, in pursuance of their previous arrangements and agreements, repaired to the place where the property in question was to be exhibited for the purpose of allowing the said Garrett to inspect it, and in accordance with the terms of the said agreement as aforesaid made known to him, the said Garrett, at Weldon, and that in furtherance of the said plan and agreement Howard and the said witness Garrett proceeded to the inspection of the property in question, and that while they were therein engaged the defendants Howard and Daley were interrupted, interfered with and arrested before the said inspection was completed in accordance with the agreement heretofore made between the said Howard and Garrett, which interruption and arrest was instigated by the said Garrett and planned and concocted by him before he left the town of Weldon and for the mere purpose of trapping the defendants, then and in that event the said agreement would not be a criminal conspiracy, and the jury should find the defendants "not guilty."

7. The court instructs the jury that although you may find from the evidence that the defendants actually came together and in terms agreed to obtain of Paul Garrett his money by false pretences and to cheat and defraud him, yet if you further find from the evidence that when the false statements and pretences were made by the defendants to the witness Garrett they were such as he knew at the time to be false or by the exercise of ordinary care and prudence should have known to be false, and with such notice and knowledge on his part he assented to the requests and demands of the defendants in the hope of profiting himself thereby, then you will
215 find that the transaction as between the parties was lawful and the defendants not guilty, under either count of the indictment.

8. The jury are instructed that it is not unlawful for two or more parties to come to terms of agreement between themselves to interest and enlist with them another person in the conduct and furtherance of their business or undertaking; or, if such other person has explained to him and understands the means and process to be used in the accomplishment of the proposition in which he is about to engage, and assents to, and assumes the chances of gain to himself in engaging with such others in the furtherance of such enterprise, then there is no such false or fraudulent representations or statements made to him as will constitute the offence of conspiracy to cheat and defraud him of his money or property; and if you find from the evidence that the defendant Howard explained to the witness Garrett a scheme which he proposed to Garrett to assist in the furtherance of, and to which scheme the witness Garrett then gave his assent and approval, undertook and agreed upon terms of compensation then proposed to him, to engage in the furtherance of, in connection with Howard, and the said defendants, in the hope thereby of gain and profit to himself, then you will find the defendants "not guilty."

9. The court instruct the jury as a matter of law that it is not unlawful or criminal for two or more persons to come to terms and agree together to interest and induce another person to become interested and promote conjointly with them any matter or thing not in itself unlawful, and if you find therefore from the evidence that the defendants, through the defendant Howard, represented and proposed to the witness Garrett a scheme, project or business
216 which as explained was apparently lawful and proposed to engage the services of the witness Garrett in the promotion and furtherance thereof upon terms profitable to the said Garrett that they had a lawful right to do so, and if you further find from the evidence that the said Garrett gave his voluntary and free assent to the promotion and carrying out of the project for business thus proposed to him, you will find the defendants "not guilty."

10. The jury are instructed that it is not unlawful for two or more persons to agree together to interest with them another person in the promotion and carrying out of any enterprise of advantage and profit to such other person or to hire such other person on terms of compensation to assist them in the transaction of business, and if you therefore find from the evidence that two or more of the defendants

explained to the witness Garrett the nature of the business in which they desired his services, and that fully understanding the matter, the witness Garrett undertook and agreed to serve the defendants in the promotion and furtherance of the enterprise and business thus explained to him upon terms of advantage and profit to himself, then, as a matter of law, he had a right so to contract, and in doing so assumed all the risks and burdens incident to such contract, and if you so find and believe from the evidence in this case, you shall find the defendants "not guilty."

11. The court instructs the jury that if you find from the evidence that the witness Garrett had explained to him by any one of the defendants the nature and object of the business they were intending to promote regarding which they sought and desired his services, and that having the matter so explained to him he undertook and agreed upon terms of advantage and profit to himself to join the enterprise, business or undertaking of the defendants, and which was thus explained to him, then you will find, as a matter of
217 law, that the defendants had a perfect right so to interest and engage with them the witness Garrett in its furtherance and promotion, and that if he came to terms and agreed with any one or more of the defendants to become so interested with them in the promotion and furtherance of their enterprise, that, as a matter of law, he had a right to do so, and they had a right to so engage him and that he with them assumed and undertook all the hazard and chances of the future of such enterprise, and you should therefore find the defendants "not guilty."

12. The jury are instructed as a matter of law that parties have a right to seek each other out, contract and agree with each other with respect to any business or undertaking looking to the mutual betterment of their condition; and if you therefore find from the evidence that any one or more of the defendants sought out and explained to the witness Garrett the nature of the business in which they desired his assistance to promote and upon the same being explained to him, the witness, Garrett, assented thereto, and agreed in the hope of profit to himself to embark therein and join one or more of the defendants in the promotion thereof, then you will find, as a matter of law, that the transaction between the parties was lawful, and you should find the defendants "not guilty."

13. The indictment in this case charges the defendants with a conspiracy to falsely cheat and defraud Paul Garrett out of his money by what is known to the law as "false pretence," and a false pretence is a false representation by one person to another of a subsisting fact which is calculated to deceive the person to whom the representation is made, and which actually does deceive him, in consequence of which deceit he parts with his property, so that before the jury can convict them they must find the fact to be
218 that the defendants fraudulently combined and conspired with each other to make a false representation of some subsisting fact to Paul Garrett, the falseness of which was unknown to Paul Garrett, and which Paul Garrett believed to be true, and in

case you do not find this to be the fact it will be your duty to return a verdict of "not guilty."

14. The defendants are presumed to be innocent of all the charges against them until they are proven guilty by evidence which satisfies you beyond a reasonable doubt of their guilt; and this presumption of innocence is raised by law in their favor and is to be regarded by the jury in this case as a matter of evidence, to the benefit of which the defendants are entitled.

15. This presumption of innocence is evidence in favor of the defendants introduced by the law itself in their behalf and it continues in their favor until the end, unless it is overcome by such competent proof as satisfies the jury beyond a reasonable doubt of the defendants' guilt.

16. Unless, therefore, this presumption of the defendants' innocence, which is evidence introduced by the law in their behalf in this case and which must be considered by the jury as evidence of their innocence, is overcome by competent proof which establishes the defendants' guilt in that degree and to that extent which removes from the mind of the jury all reasonable doubt of their guilt, it will be the duty of the jury to return a verdict of "not guilty."

17. As to a reasonable doubt, the court instructs you that in this particular case, if upon considering all the evidence, you can say that in their acts and doings as found by you the defendants were actuated by any other motive than to cheat or defraud Paul
219 Garrett, and to obtain from him any money or other thing of value, as, for example, if their object and intention was to induce Paul Garrett to join *in* with them in an effort to cheat or defraud some one else, then it would be your duty to adopt that theory or that motive and that would be a reasonable doubt, and it would be your duty to return a verdict of "not guilty," and in passing upon this question it is proper that you should consider, if you find the facts so to be, that the defendants never asked Paul Garrett to advance any money; that Howard paid his expenses to come to Greensboro; that Howard told him that he would pay his expenses to go to Philadelphia and attend to their business for them and would share with him any profits that they might make.

19. While it is not necessary, in order to convict the defendant in this case, that they should have actually obtained from Paul Garrett any money or other thing of value by false and fraudulent representations, still before the jury can convict, they must be satisfied beyond a reasonable doubt, as above explained, that there was an unlawful conspiracy and agreement between the defendants to endeavor by false and fraudulent representations to obtain money from him, and the jury must further find that the false and fraudulent representations agreed to be used by the defendants must have been a false representation of a subsisting fact such as was calculated to deceive a man of reasonable intelligence and information and actually did deceive Paul Garrett.

20. A mere false affirmation of the value of any article is not indictable and the pretence to be criminally false, must be of a past

or subsisting fact, capable of deceiving a person of ordinary caution and prudence; so that your inquiry will be, was Paul Garrett
220 a man of ordinary caution and prudence, such as the representation of Howard was capable of deceiving;—and in passing upon this question it is your duty to consider whether it did deceive him; consider his demeanor on the witness stand; his telegram to the chief of police in Richmond; his letter to Patterson; the fact that he admits he sent Mims to Greensboro before he came himself; his instructions to Mims, and his conversation with Patterson after his arrival in Greensboro; the fact that he says he was satisfied Patterson and Mims would be at the meeting place between him and the defendants, Howard and Daley, for his protection; and the fact that he testifies that as Howard left his office in Weldon he told his clerks to look out of the window if they wanted to see a gold-brick man.

21. If the jury shall find from the evidence, at the time Paul Garrett agreed with Howard in Weldon to attend to the business for him and his alleged partner of selling their gold and aiding them in the purchase of machinery to work the mine, he knew or had reason to believe that a fraud was intended, and he came to Greensboro ostensibly to further that fraud, but really for the purpose of entrapping the defendants that he might have them arrested and that he was not defrauded or cheated out of any money or other thing of value by the defendants or by the false representations agreed to be made by them, then the court instructs you that no crime has been committed, and it will be your duty to return a verdict of "not guilty," and in passing upon the question of the contract and agreement between Howard and Garrett, it is your duty to consider the two telegrams which were written by Garrett himself and given by him to Howard to be sent back to him (Garrett), and also to consider the fact that Howard gave to Garrett $10
221 and agreed to pay all expenses which that sum did not cover; and in passing upon the question of the knowledge and belief of Garrett, you will consider the telegram sent by him to the chief of police in Richmond and the letter written by him to the attorney general in Richmond, and the letter written by him to A. C. Patterson, and the sending by him of a Mr. Mims of Weldon to Greensboro, and such other acts done by him looking to the apprehension and arrest of the defendants.

22. The court further instructs the jury that upon the evidence adduced in this case the defendants, as a matter of law, are not guilty, and the jury should so find, and return their verdict accordingly.

XXV.

The court erred in refusing to respond to the instructions prayed by the defendants, and in failing to assign any reason, as a matter of law, for such refusal.

XXVI.

The court erred in using the following language in his charge to the jury:

1. "By pursuing this course, no possible wrong can be done the defendants, as an error committed by the court in instructing you upon the law in this case can, if the defendants feel aggrieved thereby, be corrected on appeal to our supreme court;" in that this language amounted to an expression of opinion of the court that the defendants were guilty.

2. "The statute of 33 Edward 1st *de conspiratoribus*, which statute has been commented upon by counsel for the defendants, was only declaratory of the common law to the extent of the crimes enumerated, leaving the common law as applicable to all
222 other forms of conspiracy known to the law. Not only have the courts of England acted upon this interpretation of the law, but every State in this Union where the common law prevails, so far as the court is advised, has acted upon and upheld this interpretation of the law of conspiracy. To do otherwise in States that rely upon the common law and which have no statute broad enough to cover all forms of conspiracy would be to say that many objectionable and dangerous conspiracies could be formed and their ends consummated and yet the law be impotent and powerless to prevent or punish such;" because by this language the jury must necessarily have inferred that his honor meant that whether conspiracy was an offense by the common or statute law of North Carolina, the defendants were guilty.

3. "It is a rule of law well established that all who engage in a conspiracy, as well *as* those who participate after it is formed as those with whom it originates, are equally liable and the acts and declarations of each in furtherance of the common illegal design are admissible against all. Every one who enters into a design, in other words a conspiracy, is equally deemed in law a party to every act which may afterwards be done by any of the others in furtherance of such common design."

4. "Reference has been made by counsel for the defense to the testimony of the witness Garrett and his course in connection with the apprehension and arrest of the defendants in connection with this charge and has been made the subject of comment and criticism. The court therefore takes occasion to say that if the evidence as disclosed by the testimony of Garrett satisfies you that he acted in the matter either for the purpose of detecting the defendants, having suspected them of an intention to cheat and defraud
223 him, or if he acted under the belief that the representations and inducements held out to him were honest and true, and that in consequence of either of these beliefs he came to Greensboro to ascertain the truth of such impressions, then he acted within the provisions of the law, and his course is not the proper subject of criticism or adverse comment. The court in this connection charges you that there is no evidence that in any way connects him with the defendants in any charge of conspiracy to violate the law."

5. "If he (meaning the witness Paul Garrett) comes to detect and apprehend the defendants in the commission of an intended crime his course is not only proper but is commendable. If he came under the impression that the business transaction was a legitimate

and honest one by means of which he would be able to acquire a legitimate and honest profit, then he had a right to come for such purpose, and it would not be a subject of criticism."

XXVII.

The court erred in holding, as a matter of law, that the offense with which the defendants were charged and of which they were found guilty by the jury was a felony.

XXVIII.

The court erred in punishing the defendants by sentencing the defendants Howard and Hawley for ten (10) years' hard labor in the State's prison, and the defendant Daley to seven (7) years' hard labor therein, the offense of conspiracy being only a misdemeanor in North Carolina. The punishment imposed by the court is therefore unlawful, cruel and inhuman, and in violation of article 1, 224 section 14, of the constitution of North Carolina, and of article 8 of the amendments to the Constitution of the United States.

XXIX.

The court erred in overruling defendants' motion to set aside the verdict of the jury and for a new trial in said cause.

XXX.

The court erred in refusing defendants' motion in arrest of judgment.

The foregoing statement, together with the record proper and the affidavit of defendants and the order of the court allowing the defendants to appeal *in forma pauperis*, is to constitute defendants' case on appeal.

L. A. GILMORE,
BYNUM & BYNUM,
JOHN A. BARRINGER,
Attorneys for Defendants.

North Carolina Supreme Court.

I, Thomas S. Kenan, clerk of the supreme court of North Carolina, do hereby certify the foregoing to be a true and correct copy of the printed record, in the case of The State against J. L. Howard and Others, on file in this court.

Given under my hand and seal of said court at Raleigh, this the seventh day of December, 1901.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Cl'k Supreme Court of N. C.

Endorsed on cover: File No. 18,511, E. North Carolina C. C. U.S. Term No. 312. J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. D. Hawley, appellants, *vs.* Captain J. M. Fleming, warden of State's prison of North Carolina. Filed April 23, 1902.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 212

J. L. HOWARD, ALIAS FRANK THOMPSON, ALIAS [illegible] ALIAS GONEZ BONO, AND H. D. HAWLEY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED APRIL 20, 1903.

(16,512.)

(18,512.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 313.

J. L. HOWARD, ALIAS FRANK THOMPSON; A. L. DALY, ALIAS GONEZ BONO, AND H. D. HAWLEY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 29, 1902.

a In the Supreme Court of North Carolina, October Term, 1901.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ BONO, and H. D. Hawley
vs.
THE STATE OF NORTH CAROLINA.

To the honorable the chief justice of the supreme court of North Carolina:

Your petitioners, J. L. Howard, A. L. Daley and H. D. Hawley above named respectfully show unto this honorable court that heretofore on to wit, at the June term 1901 of the superior court of Guilford county, North Carolina, your petitioners were indicted for a criminal conspiracy, which said indictment was in words and figures as follows, that is to say:

Superior Court, June Term, A. D. 1901.

"STATE OF NORTH CAROLINA,
Guilford County.

"The jurors for the State, upon their oath present, that J. L. Howard, alias Frank Thompson, late of the county of Guilford, on the 22nd day of March, 1901, with force and arms at and in the county aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest practices, in secrecy, with deceit and intent to defraud, among themselves unlawfully, wilfully, fraudulently and deceitfully did combine, conspire, confederate and agree together by divers false pretenses and subtle means and devises, to obtain from one Paul
b Garrett, large sums of money, and him the said Paul Garrett to cheat and defraud out of his monies, goods and chattels contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State."

Your petitioners further aver that on to wit, in June, 1901, said case was called for trial, and before a petit jury duly empanelled, petitioners went to trial, upon a plea of not guilty; his honor Judge Council, presiding; and evidence was offered on behalf of the State of North Carolina, and at the conclusion of the evidence offered by the State, the defendants below offering no evidence in their behalf, the case went to said jury upon a written charge by said judge; that thereafter said jury found all the defendants guilty, as charged, of said conspiracy; and that thereafter the said judge sentenced the said Howard to a term of ten years in the penitentiary of the State of North Carolina, and the said Hawley to a term of ten years in said penitentiary, and the said Daley to a term of seven years in said penitentiary.

Your petitioners further aver that thereafter, under the statutes of the State of North Carolina, they prayed their appeal to the supreme court of the said State, praying in addition thereto that they

be allowed to prosecute their said appeal as paupers; both of which said prayers were granted; and that thereupon and thereafter, in pursuance of said appeal, said case came on to be heard in said supreme court, and was there duly argued on behalf of the State and of all these petitioners.

Your petitioners further aver that after said hearing as aforesaid in said supreme court of said State, said supreme court took said cases under advisement, and that thereafter on to wit, the 3rd day of December, A. D. 1901, rendered its opinion affirming the decision of said superior court, and affirming the sentence of said superior court that said defendants, Howard, Daley and Hawley should serve their said sentences of ten, ten and seven years respectively, in the penitentiary of the State of North Carolina.

Your petitioners further aver that the said decision of the said superior court and the said judgment rendered therein and the judgment rendered by the supreme court of the said State of North Carolina in affirmance of the judgment of said superior court, were and are and each of them was and is in contravention of the express provisions of the Constitution of the United States in this, that is to say:

1st. The indictment, arrest, imprisonment, conviction, sentence and judgment in the superior court of Guilford county and the affirmance by the supreme court of the State of North Carolina of said judgment of said Guilford county superior court were and are not due process of law in this, that is to say:

(*a.*) The indictment charges a conspiracy to cheat and defraud, which was not and is not an offence under the statutes and code of North Carolina.

(*b.*) No such offense as charged was known to the common law of England, prior to the Declaration of Independence of July 4th, 1776, which said common law the said State of North Carolina adopted as a part of the law of said State.

(*c.*) No such offense is known to the common law of North Carolina as adopted from England and as interpreted by the courts of said State.

(*d.*) The criminal code of North Carolina assumes to cover all criminal offenses and to exclude all acts other than those described by its terms as being criminal; and under the terms of such code no such crime as described and set forth in said indictment is justiciable or punishable by the courts of said State under said code.

(*e.*) The legislature of the State of North Carolina has expressly repealed the common law of England and the ancient statutes relating to conspiracy, and has substituted therefor nothing touching the offense described in the indictment in this case; and such indictment charges no offense known to the law, statutory or other of said State.

II.

Your petitioners further aver that by reason of the foregoing the said superior court of Guilford county was without jurisdiction to try your petitioners or to impose a sentence upon them, and said

supreme court of North Carolina was without jurisdiction to affirm said sentence.

III.

Your petitioners further aver that the sentence of the Guilford county superior court and the affirmance thereof by said supreme court were contrary to the 14th amendment of the Constitution of the United States in this, that said sentence and said affirmance were and are and each of them was and is not due process of law as said term is used in said 14th amendment.

Your petitioners further aver that all of said points above set forth and hereinafter mentioned were raised in said Guilford county superior court and in said supreme court, as will more fully appear by the record in said cause; and that said superior court and said supreme court each of them refused to consider and ignored constitutional questions. And petitioners aver that said supreme court was the highest court in said State to which said cause could be submitted, and that petitioners have exhausted their remedies in said court.

IV.

(*a.*) Your petitioners further aver that the sentences in the judgment abov- set forth are cruel and unusual, and by said sentences the said Guilford county superior court, and in affirming the same the said supreme court, have violated the 14th amendment of the Constitution of the United States in this, that said courts have denied your petitioners the equal protection of the law as citizens of the United States and as citizens of a State different from the State of North Carolina; and have denied your petitioners the equal protection of the laws required by the Constitution of the United States to be extended to the citizens of the State of North Carolina.

(*b.*) Your petitioners further aver that the sentences in the hearings above set forth and the punishments inflicted and imposed by the said superior court of Guilford county, North Carolina, and affirmed by the said supreme court of North Carolina, for the alleged offense of which your petitioners were unlawfully convicted, were and are and each of them was and is unlawful, cruel and unusual, and in violation of article 1, section 14, of the constitution of North Carolina, and of art. 8. of the Constitution of the United States.

(*c.*) Your petitioners further aver that by the judgment of the said Guilford county superior court and the affirmance thereof by the supreme court of said State the said State of North Carolina has discriminated against your petitioners and has adjudged as against them a punishment far more severe than said State of North Carolina for the like alleged offense has ever imposed upon citizens of its own State. And further said sentences are wholly unauthorized by the laws of said State.

V.

Your petitioners further aver that the judgment of said Guilford court affirmed by said supreme court is a judgment *ex post facto* and void under the Constitution of the United States.

VI.

That said Guilford superior court in its written charge to the jury in said cause violated the said 14th amendment to the Constitution of the United States in this: that in the face of the law of North Carolina, the judge of said superior court neglected and refused to charge said jury that in said State defendants in all criminal
f cases w-re then entitled to a presumption of innocence in their favor, which said presumption exists and remains until overcome by positive and affirmative evidence of guilt. That by section 413 of the Code of North Carolina, the trial judge is required to put to the jury any and every hypothesis of fact embraced in instructions offered by defendants and to explain to such jury that such hypothesis is supported by the evidence and the law, or else to state to the jury wherein such hypothesis is not sustained by the law or the facts, either or both; but though defendants asked in a series of instructions numbered from 3 to 13 inclusive, the court failed and refused to instruct the jury as to the hypothesis set out in said instructions, though said instructions so prayed embodied a state of fact which the evidence adduced tended to prove. That in violation of said section in its charge, the trial court singled out the prosecuting witness, Garrett, and distinctly commended him and his acts to said jury.

That in violation of the law of said State, said trial judge intimated to said jury his belief that the defendants were guilty, by stating in his said charge that if said defendants felt themselves aggrieved by the rulings and charge of said court, they might appeal to the supreme court.

The said supreme court, in its opinion, has neglected and refused to pas- upon any of the said questions in this paragraph noted, though each and every one of them was distinctly raised in the record and earnestly pressed in the printed brief submitted; and thereby said supreme court has discriminated against these petitioners and has denied to them the equal protection of the laws of North Carolina in violation of the 14th amendment to the Constitution of the United States.

VII.

Your petitioners further show that on the 20th day of March,
g 1901, they were in the said county of Guilford arrested and taken into custody without warrant and upon preliminary examination before a magistrate were held to the June term of the said Guilford superior court, without bail where they remained until their conviction and sentence aforesaid, when the said supreme court in violation of the Constitution of the United States required of your petitioner Howard a bail of $5,000 and of your petitioner Hawley $5,000 and of your petitioner Daley a bail of $3,000 all of

which was exorbitant and excessive, and in default of ability to give the same your said petitioners and each of them have been from thence hitherto and now are confined in the pen-tentiary of North Carolina.

(c.) Your petitioners further aver that their imprisonment in the pen-tentiary of North Carolina is unauthorized and unlawful, and further for the reason that the appeal of your petitioners from the judgment and sentence of the superior court of Guilford county vacated the judgment and sentence and that your petitioners have never been resentenced or adjudged to undergo said punishment or sentence or any other punishment or sentence by any court of the State of North Carolina; on the contrary, your petitioners aver and show unto your honor that the said judgment of the superior court of Guilford county was affirmed by the said supreme court in the afternoon of the third day of December, 1901, and that the sheriff of Guilford county on the 13th day of December, 1901, without the order or mandate of the said supreme court or the judgment and resentence of them by the said superior court of said Guilford county, carried your petitioners to the pen-tentiary of said State where they now remain, all of which your petitioner avers was illegal and was and is in direct violation of the law of said State and of the 14th amendment of the Constitution of the United States.

Wherefore your petitioners pray that a writ of error in due form issue by this honorable court returnable into the Supreme Court of the United States and for a citation and supersedeas; and that pending the hearing and disposition of said writ of error in said Supreme Court of the United States your petitioners may be allowed their liberty on terms of reasonable bail.

And your petitioners will ever pray.

h

J. L. HOWARD,
H. D. HAWLEY,
A. L. DALEY, *Petitioners*,
By L. A. GILMORE,
FRANK P. BLAIR, AND
BYNUM & BYNUM,
Their Attorneys.

STATE OF NORTH CAROLINA, *Supreme Court,* } *ss:*

Let the writ of error issue upon the execution of a bond by the plaintiffs in error to the State of North Carolina, in the sum of five hundred dollars; said bond not to act as a supersedeas.

Dated first day of March 1902.

DAVID M. FURCHES,
Chief Justice.

[Endorsed:] Petition.

i In the Supreme Court of the United States.

J. L. HOWARD, A. L. DALEY, and H. D. Hawley, Plaintiffs in Error,
vs.
THE STATE OF NORTH CAROLINA, Defendant in Error.
} Error to the Supreme Court of North Carolina.

Assignments of Error.

Come now J. L. Howard, A. L. Daley and H. D. Hawley, the above-named plaintiffs in error by Leslie A. Gilmore and Frank P. Blair, their attorneys, and respectfully show to this honorable court that by the proceedings and judgment of the supreme court of the State of North Carolina in the above-entitled cause, they feel themselves aggrieved, and they assign error in such proceedings and judgment as follows:

1st. The judgment of said supreme court of North Carolina is repugnant to the 14th amendment of the Constitution of the United States, and these plaintiffs in error have been convicted and sentenced by the courts of said State without due process of law, in this:

(*a.*) That a conspiracy to cheat and defraud is not a crime under the statutes and code of said State.

(*b.*) No such offense as charged is known to the common
j law of *of* North Carolina.

(*c.*) The criminal code of said State assumes to cover all crimes and to exclude from punishment all acts other than those described as criminal by said code; and that under the terms of said code there is no such offense as that set out in said indictment.

(*d.*) Such indictment charges no offense known to the law, statutory or other, in said State.

2nd. The punishment adjudged by the superior court of Guilford county and affirmed by the supreme court of said State in said cause was cruel and unusual under the constitution and laws of said State, and by said judgment and said affirmance, plaintiffs in error have been denied the equal protection of the laws of said State.

3rd. Said punishment was cruel and unusual within the meaning of the 8th amendment of the Constitution of the United States.

4th. Said punishment was wholly unauthorized by the laws of said State, and was hence contrary to said 14th amendment.

5th. The judgment of said Guilford superior court and the affirmance thereof by said supreme court, were and are *ex pos- facto* and void; in this, that they have increased, without warrant of law, the punishment theretofore given in said State for offenses such as that attempted to be set out in said indictment.

6th. That said Guilford superior court in its written charge to the jury in said cause violated the said 14th amendment to the Constitution of the United States in this that in the face of the law of North Carolina, the judge of said superior court neglected and refused to charge said jury that in said State defendants in all criminal cases

were then entitled to a presumption of innocence in their favor, which said presumption exists and remains until overcome by positive and affirmative evidence of guilt. That by section 413 of the Code of North Carolina, the trial judge is required to put to the jury any and every hypothesis of fact embraced in instructions offered by defendants and to explain to said jury that such hypothesis is supported by the evidence and the law, or else to state to the jury wherein such hypothesis is not sustained by the law or the facts, either or both; but though defendants asked, in a series of instructions numbered from 3 to 13 inclusive, the court failed and refused to instruct the jury as to the hypothesis set out in said instructions so prayed though said instructions embodied a state of fact which the evidence adduced tended to prove. That in violation of said section 413 in its charge, the trial court singled out the prosecuting witness, Garrett, and distinctly commended him and his acts to said jury.

That in violation of the law of said State, said trial judge intimated to said jury his belief that the defendants were guilty, by stating in his charge that if said defendants felt themselves aggrieved by the rulings and charge of said court, they might appeal to the supreme court.

The said supreme court, in its opinion, has neglected and refused to pass upon any of the said questions in this paragraph noted, though each and every of them was distinctly raised in the record and earnestly pressed in the printed brief submitted; and thereby said supreme court has discriminated against these petitioners and has denied them the equal protection of the laws of North Carolina in violation of the said 14th amendment to the Constitution of the United States.

7th. The denial of bail before indictment found, and the fixing of bail pending appeal at an aggregate of $13,000, was in violation of the 8th amendment of the Constitution of the United States.

Wherefore plaintiffs pray this court to examine and correct said errors and to reverse, set aside and annul the judgment of said supreme court and the judgment of said superior court in said cause.

J. L. HOWARD,
A. L. DALEY, AND
H. D. HAWLEY,
Plaintiffs in Error,
By LESLIE A. GILMORE &
FRANK P. BLAIR,
Their Attorneys.

[Endorsed:] Assig. of errors.

m UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of North Carolina, before you or some of you, being the highest court of law of the said State in which a decision could be had in the said suit between The State of North Carolina, plaintiff, and J. L. Howard, alias Frank Thompson; A. L. Daly, alias Gonez Bona; and H. D. Hawley, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under said clause of said Constitution, a manifest error hath happened, to the great damage of the said J. L. Howard, A. L. Daly, and H. D. Hawley, as by their petition appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Wash-
n ington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable —— ——, Chief Justice of the United States, the 15th day of March, in the year of our Lord one thousand nine hundred and two.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk of the United States Circuit Court for the Eastern District of North Carolina.

Allowed by
D. M. FURCHES,
Chief Justice.

Filed in supreme court of North Carolina March 25, 1902.

o UNITED STATES OF AMERICA, *ss:*

To Robert D. Gilmer, attorney general of the State of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to writ of error filed in the clerk's office of the supreme court of North Carolina, at Raleigh, wherein J. L. Howard, alias Frank Thompson; A. L. Daly, alias Gonez Bono; and H. D. Hawley, are plaintiffs in error and The State of North Carolina is defendant in error, whose attorney general you are, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David M. Furches, chief justice of the supreme court of the State of North Carolina, this the 1st day of March, in the year of our Lord one thousand nine hundred and two.

DAVID M. FURCHES,
Chief Justice of the Supreme Court of the State of North Carolina.

I hereby acknowledge service of the within and foregoing citation and of the writ of error therein mentioned for and on behalf of the defendant in error, The State of North Carolina, this — day of *December*, 1901.

ROBERT D. GILMER,
Attorney General of the State of North Carolina.

Filed in supreme court of North Carolina March 25, 1902.

[Endorsed:] For U. S. Sup. Ct. Citation.

p (Title of Cause.)

Know all men by these presents, that we, J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, as principals, and The American Bonding & Trust Company of Baltimore City, as surety, are held and firmly bound unto the State of North Carolina in the full and just sum of five hundred dollars to be paid to the said State of North Carolina, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this twenty-seventy day of February in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a term of the supreme court of North Carolina in a suit pending in the said supreme court between J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley as defendants, and The State of North Carolina as plaintiff, judgment was rendered against said defendants and the said defendants having prosecuted a writ of error in the Supreme Court of

the United States to reverse the judgment aforesaid and a citation having issued directed to the said State of North Carolina citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington the —— 1902.

Now the condition of the above obligation is such that if the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain *to remain* in full force and virtue.

In witness whereof we have hereunto set our hands and seals this twenty-seventh day of February A. D. 1902.

J. L. HOWARD, ALIAS FRANK THOMPSON. [SEAL.]
A. L. DALEY, ALIAS GONEZ BONO. [SEAL.]
H. D. HAWLEY. [SEAL.]
THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY,
By JAS. BOND, *President.*

Attest: EDWIN W. POE, *Assistant Sec.*

Approved this 1st day of March, 1902.

D. M. FURCHES,
Chief Justice Supreme Court of N. C.

q STATE OF NORTH CAROLINA, }
Guilford County. }

Be it remembered that at a regulur term of the superior court begun and held on the 3rd day of June, 1901, at the court-house in Greensbore, N. C., before the Honorable W. B. Councill, judge presiding, the following proceedings were had:

The following were duly drawn, sworn and charged as grand jurors for this term: W. C. Boren, foreman; W. D. Moore, R. L. Hodgin, Alfred Apple, Henry D. Voss, Geo. W. Christopher, T. J. Roach, L. A. Brown, D. C. Aldridge, John C. Sechrest, W. H. Case, Jesse W. Sapp, Lucien W. Smith, E. M. Huffines, J. C. McLean, A. M. Briggs, A. E. Corum, R. H. Crouch.

That the said grand jury returned in open court the following bill of indictment:

STATE OF NORTH CAROLINA:

Superior Court, Guilford County, June Term, A. D. 1901.

The jurors for the State, upon their oaths present, that J. L. Howard, alias Frank Thompson, A. L. Daley alias Gomez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March A. D. 1901, with force and arms at and in the county aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest prac-

tices, in secrecy, with deceipt and intent to defraud, among themselves unlawfully, willfully, fraudulently, feloniously, and deceitfully did combine, conspire, confederate and agree by divers false pretences and subtle means and devices, to obtain from one Paul Garrett large sums of money and him the said Paul Garrett to cheat and defraud out of his monies, goods and chattels contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

r Second count. The jurors for the State upon their oaths do further present, that J. L. Howard alias Frank Thompson, A. L. Daley alias Gomez Bono and R. D. Hawley, late of the county of Guilford on the 22nd day of March A. D., 1901, being persons of fraudulent minds and evil dispositions and wickedly devising and intending to rob one Paul Garrett of his monies, goods and chattels, did unlawfully, wickedly and feloniously conspire, combine, confederate and agree together, in and upon one Paul Garrett in the peace of God and of the State then and there being, feloniously to make an assault on him the said Paul Garrett, in bodily fear and danger of his life, then and there feloniously to put, and the monies, goods and chattels of the said Paul Garrett from the person and against the will of the said Paul Garrett, then and there feloniously and fraudulently to steal, take and carry away as by the said J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. D. Hawley had been mutually agreed and undertaken to do, to the evil example of all good citizens and against the peace and dignity of the State.

Third count. The jurors for the State upon their oath do further present, that J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. G. Hawley, late of the county of Guilford, being persons of fraudulent minds and dispositions and wickedly devising and intending to cheat and defraud the said Paul Garrett out of his monies, goods, chattels and property, did on the 20th day of March A. D. 1901, in the county of Guilford aforesaid, feloniously, wickedly and deceitfully combine, conspire, confederate and agree together to cheat and defraud the said Paul Garrett of his monies, goods, chattels and property as aforesaid by the false and deceitful color and pretenses as follows, to wit: By him the said J. L. Howard alias Frank Thompson, pursuant to a conspiricy, confederation and agreement theretofore had and made between him and his co-conspirators above named

s falsely, fraudulently and deceitfully pretending and representing to the said Paul Garrett, that he, the said J. L. Howard, alias Frank Thompson and his associate and confederate, Gonez Bono, alias A. L. Daley, were then and there the owners of and in possession of large blocks of gold as well as the owners of large and valuable mining interests in Arizona which said gold was held by the said Gonez Bono on Buffalo creek near the city of Greensboro, where the said Paul Garrett was then and there taken and the said blocks of metal then and there shown him, when the said J. L. Howard, alias Frank Thompson, pursuant to the conspiracy theretofore had and made, pretended that the said blocks of metal were solid gold 22 karats fine and of the value of many thousands of dol-

lars which they offered to demonstrate by chemical analysis to be made by their said co-conspirator, H. D. Hawley, who was then and there waiting near by in the city of Greensboro with an assayer's outfit to fraudulently and falsely analyze and assay said spurious metal and pronounce it pure gold, thereby aiding his co-conspirators in the execution of this common, fraudulent and felonious design to cheat and defraud the said Paul Garrett, in pursuance of a common conspiracy and confederation had and made by and between the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley, and the said J. L. Howard, alias Frank Thompson, then and there sought to dispose of and sell to the said Paul Garrett the said blocks of metal for large sums of money; whereas in truth and in fact the said blocks of metal falsely and fraudulently represented to be gold were not gold but of a cheap and comparatively worthless metal by means of which said false, fraudulent and felonious representation the said J. L. Howard, alias Frank Thompson, A. L. Daley alias Gonez Bono and the said H. D. Hawley sought and attempted to obtain unjustly and unlawfully large sums of money from the said Paul Garrett contrary to the form of the statute in such cases provided and against the peace and dignity of the State.

BROOKS, *Solicitor.*

Endorsed on the back as follows:

"State *vs.* J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. D. Hawley. Indictment conspiracy. Gov. pros. witnesses—Paul Garrett x, A. C. Patterson, W. J. Weatherly x, Garland Daniels x.

Those marked x sworn by the undersigned foreman and examined by the grand jury, and this bill found. A true bill.

W. C. BOREN,
Foreman Grand Jury."

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Indictment: Conspiracy.

Motion by defendants to separate witnesses, and the court stated that he would not exclude from the court-room the high sheriff of the county, nor his deputy, nor the principal witness for the prosecution and the court further states that this is a matter discretionary with the court, and considering the high moral character of the witnesses above mentioned, declines the motion.

Defendants except to the remarks of the court.

The remarks of the court were made before jury was passed upon by either State or defendants.

In this case the following jury sworn and empanelled: Frank Barber, B. B. Miles, G. M. Rumley, J. Q. Curtis, W. S. Holt, J. W. Busick, A. M. Farrington, D. M. Glass, S. H. Coltrane, C. H. Fields, W. A. Heath, G. K. Briggs.

J. R. Robinson sworn as officer of the jury.
The jury for their verdict say: Defendants guilty.

STATE
vs.
A. L. DALEY, alias GONEZ BONO; J. L. HOWARD, alias FRANK Thompson, and H. D. Hawley.

Defendants are again brought into court. Motion — defendants to set aside verdict. Motion denied. Motion by defendants for new trial. Motion overruled. Motion in arrest of judg't. Motion denied. Motion of solicitor for judgment. Judgment of the court that the defendant J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for the term of ten years. Judgment of the court that the defendant H. D. Hawley be imprisoned in the State penitentiary for the term of ten years. Judgment of the court that the defendant A. L. Daley, alias Gonez Bono be imprisoned in the State penitentiary for the term of seven years.

Defendants except to the judgment as pronounced by the court and appeal to the supreme court. Notice of appeal waived in open court. Appeal bond fixed at the sum of fifty dollars, or otherwise allowed to appeal as the law allows.

By consent defendants allowed fifty days to serve case on appeal, and State allowed thirty days thereafter to accept case on appeal or file counter-case. Bail bond for defendant J. L. Howard alias Frank Thompson fixed by the court at the sum of five thousand dollars. Bail bond for the defendant H. D. Hawley fixed by the court at the sum of five thousand dollars. Bail bond for the defendant A. L. Daley alias Gonez Bono fixed by the court at the sum of three thousand dollars.

v-133 STATE OF NORTH CAROLINA,
Guilford County.

I, Jno. J. Nelson, clerk of the superior court for said county do hereby certify that the foregoing is a true copy of the indictment, trial and judgment in the case State vs. J. L. Howard alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, as same appears on record in this office.

Witness my hand and official seal at office in Greensboro, this October 1st, 1901.

JNO. J. NELSON,
Clerk Superior Court.

[OFFICIAL SEAL.]

* * * * * * *

134 (Docket entries: Appeal docketed October 14, 1901. Argued October 22. Opinion delivered by Clark, J. December 3, affirmed. Furches, C. J. and Douglas, J. dissenting. Certificate sent to court below December 11 by special order of this court upon the application of the chairman of the board of commissioners of Guilford county.)

(*Motion of Defendants.*)

Filed October 22, 1901.

In the Supreme Court of North Carolina.

(Title of Cause.)

Appeal from the superior court of Guilford county.

Come now appellants and move the court to reduce the amount of the bonds required by the trial judge for their appearance, pending the result of this appeal, as the same appears fixed on page 106 of the record, at the bottom of page 106 and top of page 107 of the record in said case, to which exception was then duly taken on the ground that it was excessive. To which exception was reserved on page 107.

FRANK P. BLAIR,
L. A. GILMORE,
WM. P. BYNUM, JR.,
Attorneys for Defendants.

135 Case argued by Bynum & Bynum, F. P. Blair, and L. A. Gilmore, for appellants. Att'y Gen. Gilmer for the State.

Opinion.

CLARK, *J.*:

The defendants, J. L. Howard, alias Thompson, Gonez Bono, alias A. L. Daley, and H. D. Hawley, were indicted for a conspiracy to defraud. The indictment was in three counts. At the close of the evidence for the State, the defendants moved the court to require an election by the State upon which count it would rely for conviction. Thereupon the solicitor elected to rely upon the first count, and entered a "*nolle prosequi* as to the second and third counts; these other counts to be referred to as furnishing particulars." Upon this being done, the defendants asked the court to instruct the jury to return a verdict of not guilty, and excepted to the refusal. The defendants introduced no evidence. The three counts were simply a description of the same transaction in different ways, and the joinder was unobjectionable. The court need not, therefore, have required an election. State *v.* Barber, 113 N. C., at page 714, citing State *v.* Morrison, 85 N. C. 561; State *v.* Allen, 107 N. C. 805, State *v.* Harris, 106 N. C. 682, State *v.* Parish, 104 N. C. 679, State *v.* Horan, 61 N. C. 571, 576. The evidence is uncontradicted, and its chief features will be set out by the reporter in the statement of the case. It is almost dramatic in its details, and presents with striking clearness the methods of a fashion of swindling which has doubtless been little practiced in this State. The indictment in full will also be copied by the reporter.

The first exception is that the indictment did not set out the means by which the conspiracy was to be executed. The point is

expressly decided in State *v.* Brady, 107 N. C. 822, where it is held, upon our own authorities, that a conspiracy to cheat and defraud need not charge the means to be used. Such was also the common law, as will be seen by reference to the English cases therein cited,—also citing Com. *v.* McKisson, 8 Serg. & R. 420, 11 Am. Dec. 630; 3 Greenl. Ev. § 95; and while stating that some States had held differently, this court decided to abide by our own and the English rule. The learned counsel from Illinois, who ably argued this exception for the defendants, admitted this, but, at great length, endeavored to persuade us to overrule our own decisions, contending that the weight of authority in this country was to the contrary. We think not, but if it were, that alone would not be sufficient to induce us to change, unless injustice was shown to follow from our decisions. In fact, however, the weight of authority in other States seems to uphold our ruling. Among many cases to like effect are State *v.* Noyes, 25 Vt. 415; State *v.* Bartlett, 30 Me. 132; State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719; Thomas *v.* People, 113 Ill. 531; State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State *v.* Grant, 86 Iowa, 216, 53 N. W. 120; People *v.* Clark, 10 Mich. 310; 2 Bish. New Cr. Proc. 207 (2). Code Civ. Proc. § 259, provides, "The court may in all cases order a bill of particulars of the claim of either party to be furnished." In this case these particulars were fully furnished by the second and third counts, which were only nol-pros-d at the instance of the defendants, and after the close of the evidence, so that they were in full possession of all the information which a bill of particulars could have furnished them.

The next exception was for refusal of the motion to quash, "for that the allegations in the said bill of indictment, and in each and every count thereof, do not constitute a crime under the ordinance of conspirators, made and accorded by King Edward the First and his council in the thirty-third year of his reign, A. D. 1305, nor by any statutes in England since that date, nor under any common law in force in the State of North Carolina at the date of the said alleged offense." With reference to St. 33 Edw. I. "*De conspiratoribus*," Judge Councill charged the jury as follows: "Its existence can be traced back centuries prior to our independence, and such eminent ancient laww-riters as Coke, Hawkins, and others refer in their works to the existence of this crime prior to the passage of St. 33 Edw. I. '*De conspiratoribus*,' which statute has been commented upon by counsel for the defendants. Law-writers upon the
136 subject of conspiracy generally agree that the statute referred to was only declaratory of the common law to the extent of the crimes enumerated in the act, leaving the common law as applicable to all other forms of conspiracy known to the law." The cases sustaining his honor's view of the law of conspiracy are numerous,—among them, State *v.* Buchanan, 5 Har. & J. 317, 9 Am. Dec. 534, is an elaborate discussion of the question, covering 50 pages, and many authorities are cited. In this case, at page 333, 5 Har. & J., and at page 544, 9 Am. Dec., the court says: "Much reliance is placed on St. 33 Edw. I. '*De conspiratoribus*,' on the supposition that the offense of conspiracy was originally created by that statute." The learned

judge then proceeds to show (pages 333–351, 5 Har. & J., and pages 549–561, 9 Am. Dec.) that the offense of conspiracy existed prior to the passage of St. 33 Edw. I. (which was passed in 1304), and on page 351, 5 Har. & J., and page 561, 9 Am. Dec., observes: "By a course of decisions running through a space of more than 400 years, from the reign of Edward I. to the fifty-ninth year of George III., without a single conflicting adjudication, these points are clearly settled: (1) that the offense of conspiracy is of common-law origin, and not restricted or abridged by the statute 33 Edw. I.; (2) that a conspiracy to do any act that is criminal *per se* is an indictable offense at common law, for which it can scarcely be necessary to offer any authority." In State *v.* Burnham, 15 N. H. 396, Gilchrist, J., speaking for the court, says: "In the first place, we have no doubt that conspiracy is an indictable offense in this State. It is punishable at common law, its punishment is most repugnant to our institutions, and it is an offense productive of much injury, and as deserving reprehension under one form of government as another." To the same effect are Com. *v.* Hunt, 45 Mass. 111, 38 Am. Dec. 346; State *v.* Pulle, 12 Minn. 164. In the last case the defendants were indicted for a conspiracy to assault one James H. Murray, to daub and put upon his naked body a great quantity of tar and feathers; and the point was made "that there is no statute in this State creating or defining the crime of conspiracy, nor is any punishment affixed by law to any such offense, and therefore this court had no jurisdiction thereof." The supreme court held on appeal that conspiracy, not declared a crime by the statute law, was punishable because of the common law. In U. S. *v.* McCord (D. C.) 72 Fed. 159, it is said: "The statutes of the United States do not define what a conspiracy is, or create any new offense. They merely recognize the crime of conspiracy as known to the common law, and the courts must go to the common law to determine what it is." In 2 Bish. New Cr. Law, § 174, the statute of 33 Edw. I. is quoted in full, and the author adds, in subsection 2, the following: "Since this statute contains no negative word, a principle explained in another connection shows that it abrogates nothing of the prior common law, but leaves indictable whatever of conspiracy was so before." In State *v.* Younger, 12 N. C. 357, 17 Am. Dec. 571, this court held that "a combination of two or more to do any unlawful act, or one prejudicial to another, is indictable at common law as a conspiracy." State *v.* Brady, 107 N. C. 822; State *v.* Powell, 121 N. C. 635; State *v.* Wilson, 121 N. C. 650.

The cases already cited dispose of the other exceptions for refusal to quash. Some of the authorities cited by defendants are no longer authorities, since the Code of 1883 added to section 1025 the second proviso thereof, that in indictments for false pretense "it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to de-

fraud any particular person, but it shall be sufficient to prove that the party accused did the act with intent to defraud."

The third exception is as follows: "While the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and impaneled, and during the trial of said cause. The solicitor, objecting, said that the witness Paul Garrett would be the first witness examined, and the others would testify as to matters not in his knowledge, except the detection in Greensboro. Whereupon the court remarked that it was a matter of discretion with the court, and that all the witnesses, except the complaining witness, Garrett, and the high sheriff of the county, might be excluded from the court, but as to these witnesses, their high character as citizens forbade the idea that either of them would be influenced by the testimony of the other." It would, indeed, be sufficient to say that it does not appear that any one of the jurors who actually sat on the trial heard the remark, but we prefer to put our ruling upon broader ground. By the common law, judges were not prohibited from expressing an opinion upon the facts; and this is still true of the Federal courts, and all the States in which there is no statute making a change in this respect. In North Carolina the only change is that made by the act of 1796 (now Code § 413), which reads as follows: "No judge in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven." This is the extent of the statutory change. It goes no further. In State *v.* Angel, 29
137 N. C. 27, Ruffin, C. J., says: "The facts on which the act (1796) restrains him (the judge) from expressing an opinion to the jury are those respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendants depends." In State *v.* Laxton, 78 N. C. 564, Smith, C. J. says: "It is quite obvious from the words of the act that its special object was to prevent the intimation of such opinion in connection with, and constituting a part of, the instructions by which the jury were to be governed, and when its influence on their minds would be direct and effective." To same purport are De Berry *v.* Railroad Co., 100 N. C. 310; State *v.* Robertson, 86 N. C. 628; State *v.* Jones, 67 N. C. 285. These were cases in which the remarks were made by the judge during the progress of the trial, but it is not necessary that we pass upon the question whether the remark here made by the judge would be ground for setting aside the verdict if made during the progress of the trial, for it was not made at such time. At the time when made no juror had been selected, and the remark was not "to the jury," nor did it contain any opinion that "a fact was fully or sufficiently proven." No fact had been shown in evidence. The remark was not prohibited at common law, and is certainly not prohibited by any terms in the statute. No decision of our court has ever hinted that a statute forbidding the judge, "in a charge to the petit jury," from "expressing an opinion whether a fact is fully or sufficiently proven," extended to the remarks of a judge complimentary to one, who was afterwards

examined as a witness, made before the jury was selected or impaneled. In every case where such a proposition has been presented, this court has denied the application of the statute. State *v.* Jacobs, 106 N. C. 695; *id.*, 107 N. C. 774, 22 Am. St. Rep. 912; State *v.* Jackson, 112 N. C. 853.

The defendants except to the sentence imposed, of imprisonment in the penitentiary, but concede that this court has ruled otherwise in State *v.* Mallett, 125 N. C. 718, which we reaffirm.

The other exceptions are without merit, and were not seriously pressed in this court.

Affirmed.

MONTGOMERY, J., concurs in the conclusion reached by the court. He thinks, however, that what his honor said on the trial below, in declaring that two of the State's witnesses were of so high a personal character as that he would not ask them to leave the court-room, on a motion for the separation of the witnesses, and also what he said in his instructions to the jury in defending one of the same witnesses against the adverse criticisms of the defendants' counsel on the witness' testimony, was inappropriate and indiscreet. The language of the statute on the subject may not have been violated, but its spirit certainly was.

DOUGLAS, *J.*:

In dissenting from the opinion of the court, which I am constrained to do upon the highest considerations of private right and public policy, I feel much diffidence in expressing my own opinions, as they are so totally different from those of the court. However, they are the result of my deliberate judgment, and as such must find expression, as I cannot even silently concur in a decision which to me seems so dangerous in its tendencies, and so devoid of legal basis in its conclusions. I have no sympathy whatever for a gold-brick swindler, and but little for his victim, who is usually caught in the trap he thinks he has set for another. The ordinary business man has no earthly use for gold, except for what it will bring in the market, and no object in buying it unless he can resell at a higher price. Therefore he always expects to get it for less than its value from a supposed owner who must be ignorant of its value. He knows, or should know, that gold is current the world over, and that any one having it can carry or send it to the nearest mint and obtain its full value in current coin. Usually the pretended miner professes to be very ignorant, or has a partner who is even more ignorant than himself, and whose interests may be bought out at a small sum. In the case at bar the inducements offered Garrett appear to have been $25 per day and his expenses, together with a "one-third interest in everything he had," including $36,000 in gold at Greensboro, $48,000 in gold in Arizona, and a gold mine capable of producing $1,000,000 a year. In consideration for such great wealth, Garrett was to give his services only, and yet in his suit for a total breach of this contract he places his damages at the modest sum of $2,000. Again he says: "It was mighty pretty, and

I thought possibly there might be something in it. I may have been something of a phantom-chaser in this transaction." It would seem so. There is nothing in this case that appeals to my sympathies, and hence I am free to view it in its legal aspect. I believe that the defendants are all guilty, but this will not induce me to deny to them a single one of the rights which the law gives to them for their protection. I do not believe that the sole purpose of the law is to punish the guilty. A higher object still is the protection of the innocent. But, whether innocent or guilty, every citizen is entitled to a fair trial, and the equal protection of the laws. As was said by this court in State *v.* Keith, 63 N. C. 144: "These great principles are inseparable from American government and follow the American flag. No political assemblage under American law, however it may be summoned, or by whatever name it may be called, can rightfully violate them, nor can any
138 court sitting on American soil sanction their violation." This case finds its counterpart in the great case of *Ex parte* Milligan, 4 Wall. 2, 18 L. ed. 281,—great in the court that decided it, great in the counsel who argued it, great in the ability of its opinions, and greater still in the principle it settled. Milligan was, before the close of the war, tried and convicted by a court-martial of conspiracy, followed by overt acts, to seize the Federal arsenals and set free and arm the Confederate prisoners. It was held by a unanimous court that he was entitled to a trial by jury according to the law of the land. The opinion of the court uses the following language on page 18, 4 Wall., and page 295, 18 L. ed.: "Had this tribunal the legal power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and, if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured. Withdraw that protection, and they are at the mercy of wicked rulers or the clamor of an excited people." In this spirit I approach the case at bar. The defendants may be guilty and deserve their sentence, but to deny them a fair trial would be — wrong, not to them alone, but greater still to the integrity of the law, in the preservation of which every citizen has the supremest interest.

To begin with, I am opposed to any further extension of the doctrine of conspiracies, which in this State has been already carried far beyond the danger line. The court seems to rely principally upon the cases of State *v.* Buchanan, 5 Har. & J. 317, 9 Am. Dec. 234; State *v.* Brady, 107 N. C. 822, and State *v.* Younger, 12 N. C. 357, 17 Am. Dec. 571. Buchanan's case is regarded as one of the leading cases, and will probably continue to be so regarded as long as judges, impressed with its apparent learning, take for granted its

citations. But I am free to say that the argument of the learned counsel for the defendants has convinced me that that case is not only inherently vicious upon its face, but is founded upon a large array of miscitations, and embellished with a vast amount of misinformation. For instance, that case holds "that an indictment will lie at common law for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only." What limit is there to such a definition, and what is meant by the word "immoral"? In its widest sense it might mean any act which in the opinion of the court was contrary to private morality or revealed religion. Can this be the law anywhere? Certainly not in this State, unless made so by Brady's case or that at bar. I do not think that Brady's case goes that far in that direction, but on another point it does go beyond any case within my knowledge. Without any citation of authority, and by some process of reasoning incomprehensible to me, it holds that the court below properly refused an instruction that, "though the representations might be false, if the defendants honestly entertained the opinion they were true, they would be not guilty." I can only say that such a ruling is, in my opinion, without foundation in law or justice, and I regret that it should be found in an opinion of this court. It is true, the court says that the "court properly refused them in the words asked;" but as the words themselves were objectionable, and the instruction does not appear to have been given in any words, the qualification of the court merely emphasizes the refusal. The opinion of the court before us cites Younger's case as holding that "a combination of two or more to do an unlawful act, or one prejudicial to another, is indictable at common law as a conspiracy." This is in the syllabus, but not in the case. What the court said was "that every conspiracy to injure individuals, or to do acts which are unlawful or prejudicial to the community, is a conspiracy, and indictable." There is an essential difference between being prejudicial to the community and only to an individual. In that case the offense was a conspiracy to cheat by gambling, which was in itself unlawful. Younger's case is, moreover, in direct conflict with the opinion of the court as to the antiquity of the present doctrine of conspiracies, as in that case Chief Justice Taylor (perhaps more learned in the ancient common law than any judge who has ever sat upon this bench) says that "conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person, by perjury and a perversion of the law."

But it may be said that the swindle which these parties contemplated was so clearly a crime that some of this discussion has no necessary application. Admitting that to be true, I am now discussing the opinion of the court. If it goes beyond the facts of this case, so must I. If it gives its unqualified approval to the cases of Buchanan and Brady, with all their inherent errors and vast possibilities of danger, then I must express my disapproval in terms equally plain; and, if any unguarded words of mine may appear too strong, I know my brethren will ascribe them to their true motive,—the strength of my convictions. The opinions of this court

are not mere decisions of pending cases. If they were, mere *per curiam* judgments would suffice, at least in cases of affirmation.

139 The real object of the opinion, as contradistinguished from the judgment, is to lay down general principles, as applied to a certain state of facts, for the determination of all future cases of similar nature. The mere character of the defendant does not affect the principle. It is only a gold-brick man today, but who may it be tomorrow? Among the general principles resulting from the opinion of the court and the cases it specifically approves are the following: That an indictment for conspiracy will lie at common law (1) "for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only;" (2) for "a combination of two or more to do any unlawful act, or one prejudicial to another" individual; (3) that "though the representations (relied on to convict) might be false, if the defendants honestly entertained the opinion they were true they would be * * * guilty." From these propositions of law I emphatically dissent. My own views as to the dangers attending the expansion of the doctrine of conspiracies cannot be better expressed than in the following words of Judge Campbell in delivering the opinion of the court in People *v.* Barkelow, 37 Mich. 455: "There is no class of cases where defendants are better entitled to the protection of the law against vague charges than where they are charged with conspiracy. The course of legal experience has shown this to have been a familiar resort to catch innocent persons by throwing a drag-net of vague charges, and resorting to suspicions and prejudices to induce juries to convict persons who find it impossible to escape the malicious insinuations of false accusers. Titus Oates' plot has been a warning to all courts and jurists not to encourage any looseness in charges which in exciting times jurists and communities are only too ready to catch at to punish those who are unfortunate enough to be suspected." This opinion, concurred in, amongst others, by Judge Cooley, shows not only the great learning and clear comprehension of the present of those eminent jurists, but also their prophetic grasp of the possibilities of the future. A few years later the English doctrine found its legitimate outcome in Reg. *v.* Parnell, 14 Cox, Cr. Cas. 508, where the great Irish leader, with others, was indicted for a conspiracy to impoverish owners of land in Ireland by soliciting their tenants not to pay rent. Lord Fitzgerald, in summing up the case to the jury, said that it was plain and clear that an agreement of two or more persons to commit any wrongful act was an indictable offense. "If," said he, "a tenant withholds his rent, that is a violation of the right of the landlord to receive it, but it would not be a criminal act in the tenant, though it would be in the violation of a right; but, if two or more incite him to do that act, their agreement so to incite him is, by the law of the land, an offense." Is not this equivalent to saying that a bare agreement of two persons to break a simple contract, or to induce another one to do so, is a crime? I do not suppose that any one will deny that the indictment of Parnell was purely for political reasons, and, if the English rule prevails in this State, what is there

to prevent the indictment of the members of our usual labor organizations?

I am further of the opinion that the first count in the indictment, on which alone the defendants were tried, is not sufficient either to put them upon their guard, or to furnish the basis for the future defense of former conviction or acquittal. Again the English rule is invoked, but there a bill of particulars is granted practically as a matter of course. The court in its opinion cites section 259 of the Code, to the effect that "the court may in all cases order a bill of particulars of the claim of either party to be furnished." If this section applies to criminal actions, which I doubt, it cannot help this case, because the judge refused the request. Whatever might have been the effect of a bill of particulars if it had been furnished, surely the refusal of the court to grant it cannot validate an indictment insufficient in itself. But, again, the court says that the solicitor for the State need not have elected between the counts; but he did elect, and nol-pros-d all but the first count. Those counts are therefore as much out of the indictment as if they had never been in it. But the opinion says that the second and third counts gave the defendants the information they desired. Can it be that a defendant is required to go to a bill of indictment that has been nol-pros-d to find out the meaning of the bill on which he is tried? I am aware of the line of decisions that it is not necessary to set out the particular means by which the cheating was to be accomplished,—that is, the indictment need not state each particular act or false pretense upon which the State relied, because this would be impracticable; but it must set out enough to constitute a crime, and to identify that particular crime with reasonable certainty. Suppose an indictment were to charge simply that John Smith did in the year 1900, in the county of Wake, attempt to steal from William Jones; would any one suppose that Smith could be convicted? Again, suppose that Smith was indicted for attempting to burn a barn in the year 1900, and in the county of Wake; could he be tried for attempting to burn any or all of the numerous barns in Wake county that may have been in existence during the year 1900, or any other year, within the legal radius thereof? But, forsooth, if Smith is indicted for conspiracy to burn some indefinite barn, without burning or attempting to burn any barn whatever, then nothing more need be said. If such is the law, then I am ignorant of the law.

There are several errors which, for want of time, I must pass over, or notice only in the briefest possible manner.

I think the admission in evidence against Hawley of the
140 card bearing his name was fatal error. This card was found in Howard's possession after his arrest. There is no evidence that it was ever in Hawley's possession, and no suggestion that it is in his handwriting. When shown to him, he denied all knowledge of it. It might as well have borne the name of any prominent citizen of Greensboro, or State official. Would it then have been evidence against any one? If not, why should it have been evidence

against Hawley? The majesty of the law is such that the loftiest are within its reach, and the lowliest within its protection.

Passing over other points, I come now to two errors, similar in nature, but occurring at different stages of the trial, either one of which is sufficient to entitle the defendants to a new trial, and the combination of which renders it morally impossible that they should have had such a trial as they are entitled to by "the law of the land."

The record shows that after the case had been called for trial, and the defendants had pleaded not guilty, and while the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and impaneled, and during the trial of said cause. The solicitor, objecting, said that the witness Paul Garrett would be the first witness examined, and the others would testify as to matters not in his knowledge, except the detection in Greensboro. Whereupon the court remarked "that it was a matter of discretion with the court, and that all the witnesses, except the complaining witness, Garrett, and the high sheriff of the county, might be excluded from the court, but, as to these witnesses, their high character as citizens forbade the idea that either of them would be influenced by the testimony of the others." This remarkable statement of fact by his honor was made in the presence of the jury, after the case had been called for trial, and in passing upon a motion in the action. It was not necessary, as he could have refused the motion, in his discretion, without giving any reason, or he might have given the reason suggested by the solicitor, which would have been harmless. His testimony to the high character of Garrett could not have been stronger even if he had been a witness; and can we suppose that the jury would not be influenced by such a statement, coming from the judge, as to the character of a witness personally unknown to them? Taken in connection with his subsequent charge,—and the jury must have connected the two,—its practical effect was to withdraw from their consideration the credibility of a witness whose testimony was absolutely essential to the prosecution. The opinion suggests that the jury may not have heard the remark. Such a suggestion comes from the court alone. The evident gist of the exception is that the remarks were made in the presence of the jury, and were calculated to influence them. The attorney general, in his able brief for the State, says: "It is conceded by the defendants in their third assignment of error that 'these remarks of his honor were made before the jury was passed upon by either the State or defendants, but when the regular panel was present in the court-room; *in the jury-box.*'" The italics are mine. He never for a moment suggests that they were beyond the hearing of the court, but proceeds to argue that the defendants' remedy was to "have taken steps looking to the elimination of such jurors as might have been affected by the remarks of his honor." The opinion refers to the English rule permitting judges to express an opinion upon the facts, but this rule has long ceased to prevail in this country. Even where it still lingers, it is coupled with the obligation upon the

judge to instruct the jury that they are not bound by his opinion of the facts. The general rule is thus clearly stated in 11 Enc. Pl. & Prac. 97: "As stated in a preceding section, the practice in most States forbids any expression of opinion as to the weight and sufficiency of the evidence; and the rule, as will be subsequently shown, is most stringently enforced. Not infrequently judges evinced partisanship in their charges, and molded verdicts to their will; and juries as frequently shirked responsibility, and really adopted the opinion of the judge, finding their verdict as he directed. It was to put a stop to this, and to secure the constitutional right of trial by a jury, and not by a judge, that the various limitations upon this common-law power were imposed by the constitution or by statutes. The trend of modern action, both legislative and judicial, is to watch over and protect very jealously the legitimate powers of the jury, and to prevent the court from overstepping the line which separates law from fact. 'Trial judges cannot legally indicate their opinion, either expressly or impliedly, intentionally or otherwise, as to the credibility of the witnesses, or as to the truth of any fact at issue, and the subject of the evidence.'" In support of this rule five or six hundred cases are cited, of which twenty are from this State. The common-law rule was expressly abrogated in this State by the act of 1796 (now Code, § 413), which reads as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury." From the first this statute has been uniformly given a liberal interpretation, in order to carry out its essential principles; but now, for the first time, this court proposes to overrule the settled policy of a hundred years, and adhere to the exact letter of the law. This necessarily involves overruling numerous decided cases,—amongst others those of Reel's Ex'rs *v.* Reel, 9 N. C. 63; State *v.* Dick,
141 60 N. C. 440, 86 Am. Dec. 439; Willey *v.* Gatling, 70 N. C. 410; MacRae *v.* Lawrence, 75 N. C. 289; Crutchfield *v.* Railroad Co., 76 N. C. 320; State *v.* Dancy, 78 N. C. 437; State *v.* Jenkins, 85 N. C. 544. There are numerous other cases enunciating the same principle, but I have cited those only in which a new trial was granted. In all of these cases a new trial was ordered, although none of them came within the letter of the statute, inasmuch as the judge did not "give an opinion whether a fact is fully or sufficiently proven." In some of them he was not even addressing the jury, as in Dick's case. In that case this court says: "On the trial a question arose as to the withdrawal of certain confessions of the prisoner. The court declined withdrawing them, but remarked to the solicitor for the State that, after the other evidence already given in the cause, he (the solicitor) might withdraw them, if he chose to do so, which the solicitor declined. This seems to us an expression of opinion on the part of the judge that the case was sufficiently proved without the aid of the confessions. This is not directly asserted, but is a matter of inference, plainly, from the manner in which the expedient of withdrawing the testimony is suggested. * * * The object (of the statute) is not to inform the jury of their province, but to

guard them against any invasion of it. The division of our courts of record into two departments, the one for the judging of the law, the other for judging of the facts, is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the legislature intended to furnish, but their purpose was to lay down an inflexible rule of practice,—that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo. * * * This, we suppose, has been to maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was, without some such provision, constantly in danger from the will of the judge acting upon men mostly passive in their natures, and disposed to shift off responsibility, and in danger, also, from the ever-active principle that power is always stealing from the many to the few." The court has said in State *v.* Davis, 15 N. C. 612, speaking by Gaston, J.: "It is obvious that, if we confine ourselves to the words of this statute (act 1796), there is no ground for the complaint which we are now considering. But it has been long since settled that the literal is not the true interpretation of the act. Solicitous to discover and faithfully to carry into execution the legislative will, this court has fixed its *in*tention upon the purposes declared in the act, and has given to it such a construction as, it believed, would most effectually accomplish these purposes. * * * But if in doing all this he (the judge) intimates his individual opinion as to the existence or non-existence of a controverted fact, on which side of the controversy he believes the truth to be, or which of the witnesses he regards as having the higher claims to respect for his accuracy and probity, he overleaps the boundary of duty, and invades the peculiar and exclusive province of the jury." This court has said in State *v.* Jones, 67 N. C. 285: "This (the statute) has been held to mean that the judge shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of the evidence. This construction, in the last particular, goes beyond the words of the act, but it is accepted as a proper one." In State *v.* Dixon, 75 N. C. 275, this court has said: "This statute is but in affirmance of the constitution (article 1, §§ 13–17), and the well-settled principles of the common law as set forth in *Magna Charta*. The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court, tending to influence them into a verdict against their convictions, is irregular and without the warrant of law." In Crutchfield *v.* Railroad Co., 76 N. C. 320, this court granted a *venire de novo* because the judge below, in his charge to the jury, said that "it was not denied but that Dr. Bahnsen was a gentleman of unquestionably high character in his profession, and that he appeared to be a gentleman of culture." In that case the court says on page 324: "Nor does it matter if his honor was (if he was) speaking of another part of Dr. Bahnsen's testimony, when he put his estimate upon him as a physician of high character and a gentleman of culture. That was the mark put upon the man, and

it attached to every part of his testimony. A judge ought not to state to the jury his estimate of a witness, or how he appears to him." In MacRae *v.* Lawrence, 75 N. C. 239, a new trial was granted by this court because the judge below, referring to two witnesses whose testimony was conflicting, charged the jury "that both the witnesses were gentlemen, and that it was a pure matter of memory." This court, holding that such an expression was fatal error, says: "Again, one of two witness, where they differ, may be corrupt. And the party against whom his evidence is may so insist before the jury, and his honor cannot tell the jury that he is not corrupt, but that he is a 'gentleman.'" If it is fatal error for the court to tell the jury that the principal witnesses on each side are both gentlemen, how much greater error is it for the judge to single out the prosecuting witness alone, and say that he is a gentleman of such high character that his veracity must not be questioned! But it is said that this remark was made before the jury was impaneled. With all due respect for the court, this seems to me the purest technicality. If it is not *hærens in cortice*, it is because it does not
142 reach the inner bark. It is true, the jury had not been impaneled, but the case had been called for trial, and the regular venire was in the jury-box. The remark was not a mere "passing compliment," but a statement of fact upon which his honor based his ruling on a motion in the action itself. It did all the harm it could have done if it had been in the charge, and is clearly in violation of the act which this court has repeatedly said, in substance, confers no new right, but is simply in affirmance of the constitution of this State, and the principles laid down in *Magna Charta*. And yet it is proposed to overrule so many cases, and establish so dangerous a precedent, upon an immaterial ruling in Jacobs' case, sustained by a mere dictum in Jackson's. Let us examine those cases. When Jacobs' case was here, in 107 N. C. 772, 22 Am. St. Rep. 912, no allusion whatever was made to the point before us. When the case was first here (106 N. C. 695), the court says: "It is difficult to see how the remark of the judge (that he had been informed by the jailer that he apprehended that Jacobs would escape if he had the opportunity) violated any provision of this statute. No juror had been selected, the remark was not in the presence of the jury, nor did it contain any opinion that 'a fact was fully or sufficiently proved.' No facts had been shown in evidence. Indeed, had the jury been impaneled, the statute prohibited the judge 'from expressing an opinion only upon those facts respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends.'" If the remark was not made in the presence of the jury, and would not have been improper even if the jury had been impaneled, what difference did it make whether the jury was impaneled or not? In Jackson's case, 112 N. C. 851, the objectionable remark was made, not by the judge, but only by a bystander, and yet the opinion proceeds to say that "remarks made by the judge on such motions do not come within the prohibition of the statute;" citing State *v.* Jacobs, 106 N. C. 695. As the judge had made no remark whatever, this

was a pure dictum. And yet these two are the only cases which are even claimed to furnish any authority for the position of the court.'

I come now to the last exceptions that I shall discuss. These two exceptions are addressed to the following portion of his honor's charge: "Reference has been made by counsel for the defense to the testimony of the witness Garrett, and his course in connection with the apprehension and arrest of the defendants in connection with this charge, and has been made the subject of comment and criticism. The court therefore takes occasion to say that if the evidence, as disclosed by the testimony of Garrett, satisfies you that he acted in the matter either for the purpose of detecting the defendants, having suspected them of an intention to cheat and defraud him, or if he acted under the belief that the representations and inducements held out to him were honest and true, and that in consequence of either of these beliefs he came to Greensboro to ascertain the truth of such impressions, then he acted within the provisions of the law, and his course is not the proper subject of criticism or adverse comment. The court, in this connection, charges you that there is no evidence that in any way connects him with the defendants in any charge of conspiracy to violate the law. If he comes to detect and apprehend the defendants in the commission of an intended crime, his course is not only proper, but is commendable. If he came under the impression that the business transaction was a legitimate and honest one, by means of which he would be able to acquire legitimate and honest profit, then he had a right to come for such purpose, and it would not be a subject of criticism." His honor apparently proceeded upon the assumption that there were only two possible constructions to place upon Garrett's conduct,—either that his purpose was to detect crime, or to engage in a legitimate business enterprise,—one of which was proper, and the other commendable. No other hypothesis seems to have entered his honor's mind, or to have been left to the jury. Taken in connection with his previous ruling as to Garrett's high character, what was left for the jury, except to convict? If they believed Garrett, they must find at least two of the defendants guilty,—Howard and Daley. Without Garrett, they could find no one guilty. The defendants did not introduce any testimony, but relied upon their legal presumption of innocence. If they could impeach Garrett, they would be acquitted, and this they attempted to do by a rigid cross-examination. Whether they succeeded was for the jury alone to say, without any intimation whatever from his honor as to the weight of the evidence or the credibility of the witnesses. The parts of Garrett's testimony relied upon by the defendants for his impeachment are thus set out in their brief: Garrett, a man of wealth, is approached by defendant Howard, and has laid before him a proposition to take him into partnership in a gold mine, with immediate compensation for a time at $25 per day and expenses, and incidentally the probable purchase by him (Garrett) of some $12,000 worth of gold. Howard at this interview exhibited a large roll of bills, and paid Garrett $10 on account. Garrett accepted this money, and Howard left the office, having appointed a rendezvous two days later at Greensboro.

Garrett testified that at this interview he made up his mind Howard was a confidence man, and, as the latter crossed the street on leaving Garrett's office, Garrett pointed him out to two of his em-
143 ployés, with the remark, "If you want to see a genuine gold-brick man, look out of the window quick." His faith in Howard was so small that he even suspected the $10 bill paid him to be counterfeit. What, then, was the duty of Garrett when his mind first reached the conclusion that Howard was a confidence man,—a "gold-brick man"? Clearly, it was to order him out of his office, with a threat to denounce him to the authorities. He might well have gone farther. He might have informed the sheriff or the police of his interview and of his suspicions, leaving to them the duty of dealing with Howard and the others. What he did was to put himself into communication with the chief of police at Richmond, Va. He wrote a long letter to Patterson, accompanying it with a letter of introduction of Mims from Lewis. All this was to lay an elaborate plan to apprehend the defendants, for whom, by the way, he believed there was a reward outstanding of $20,000. He then gave his letters to Mims; and so solicitous was he that there should be no failure of justice, and, incidentally, that he should not fail of the reward, that he gave Mims $20 or $25 for expenses. Thus, his arrangement for arrest having been completed, he set about enticing defendants into a completion of the supposed objects of the conspiracy. He had previously, at his first interview with Howard, so far fallen in with Howard's plans as to make two drafts of a telegram,—one to use if the Indian were amenable, the other in the event he were not. On the second day after the interview with Howard, Garrett proceeded to Greensboro to keep the appointment. On arrival he saw Mims and Patterson, to whom for 30 minutes he talked "pretty plainly," and was told that the sheriff had the matter in charge. There, also, he met Howard, and, after he counted Howard's money for him, the two drove out in a buggy to the place where the Indian was camped. On this drive Howard showed signs of backing out, but Garrett urged him on,—not once but several times. The sheriff and Patterson passed them on the road. Howard thought they looked suspicious, but Garrett, mindful of his civic duty and the reward, and the roll of bills he had just counted, ridiculed the notion. The sheriff and Patterson were "just two fellows that had been downtown and got drunk." Again, Garrett said, "The next time you stop, I am going to take the horse and buggy and go back to town." When they arrived at the Indian's camp, Garrett suggested that Howard tell the Indian that he (Garrett) was Andrew Garrett's brother. "You tell him I'm Andrew Garrett's brother." The alleged gold bars were then produced, and just as the weighing was completed the officers closed in and arrested Howard and Daley. This successfully completed the first half of Garrett's plan. In Com. *v.* Leeds, 9 Phila. 569, which was a case where certain parties induced a saloon-keeper to sell them beer in violation of the Sunday liquor law, for the purpose of informing on him, Judge Paxson said: "For the relators it was urged that they were engaged in a lawful object, to wit, the enforcement of the

Sunday liquor law. * * * It was never intended that a man should violate the law in order to vindicate the law. * * *" Immediately after the returning from the scene of arrest, Garrett went to the office of King & Kimball, attorneys-at-law, and retained them to appear in the criminal prosecution, and, also being still mindful of his civic duty, to prosecute a civil suit for $2,000 against these defendants for an alleged breach of contract. In aid of this suit he caused an attachment to be levied on the clothes, trunks, jewelry, and other personal effects, including the roll of bills displayed by Howard at their first interview, and which he had kindly counted for Howard at Greensboro just before the arrest. Having secured everything in sight, even to their changes of underwear, this good citizen leaves the State of North Carolina to pay the expenses of defendants in this suit, by compelling them to defend *in forma pauperorum* Upon this review of the testimony of the prosecuting witness, as relied upon by the defendants, it seems to me clear that his honor committed fatal error in his charge, and that a new trial should be granted.

I have given much attention to this case,—more than my official duties would justly allow, and much more than the defendants apparently deserve; but I am firmly convinced that there is nothing more dangerous than to attempt to stretch established principles to meet the supposed exigencies of particular cases. I cannot do better than close this opinion with the words of Chief Justice Chase in the concurring opinion in *Ex parte* Milligan, 4 Wall. 2, 132, 18 L. ed. 281, 299, as follows: "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But, whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict even upon the guilty unauthorized, though merited, justice."

FURCHES, *C. J.* (dissenting):

Without affirming all that is said by my brother Douglas in the elaborate and learned discussion in his dissenting opinion, I cannot say that I am satisfied that the defendants have had a fair trial. In my opinion, there is error, at least, in what the judge said as to Garrett's high character on the motion to separate the witnesses, and in what he said near the close of his charge to the jury,—that Garrett's conduct was not a proper subject for unfriendly comment. In my opinion there should be a new trial.

144 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Guilford county:—upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court as delivered by the Honorable Walter Clark, justice, be certified to the said superior court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendants do pay the costs of the appeal in this court incurred, to wit, the sum of forty-six $\frac{80}{100}$ dollars ($46.80), and execution issue therefor.

145 The Supreme Court of North Carolina.

I, Thomas S. Kenan, clerk of the supreme court of North Carolina, do hereby certify the foregoing to be a full, true and correct transcript of the record on file in this court in an action entitled "State of North Carolina against J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley."

In witness whereof I have hereto set my hand and affixed the seal of said court at office, in Raleigh, this 26th day of March, 1902.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk of Supreme Court of North Carolina.

146 In the Supreme Court of the United States, October Term, 1901.

J. L. Howard, A. L. Daley, and H. D. Hawley, Plaintiffs in Error, *v.* State of North Carolina, Defendant in Error.	Writ of Error to the Supreme Court of North Carolina.
J. L. Howard, A. L. Daley, and H. D. Hawley, Appellants, *v.* J. M. Fleming, Warden, etc., Appellee.	Appeal from the United States Circuit Court for the Eastern District of North Carolina.

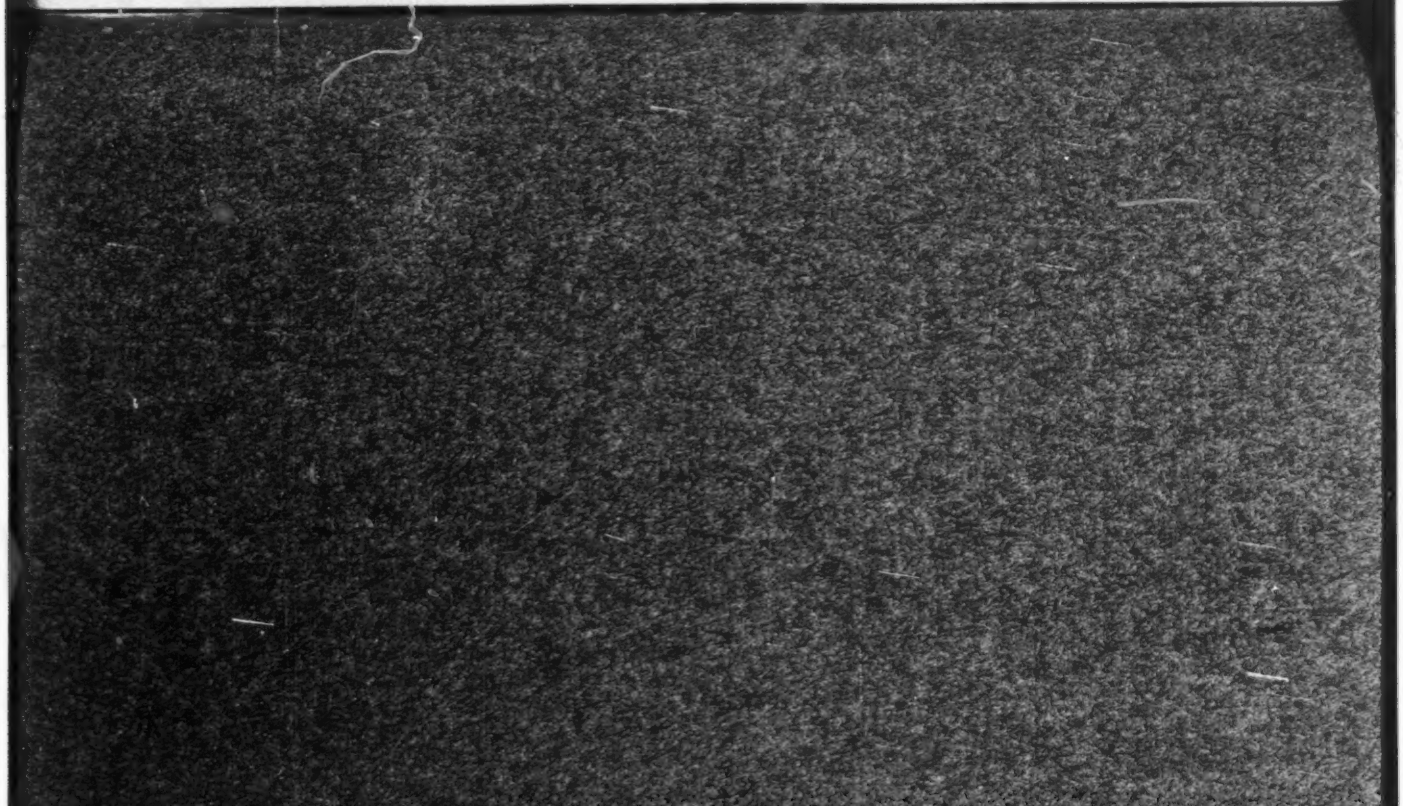
It is hereby stipulated and agreed, on behalf of the State of North Carolina, that, in the record in the case of Howard *et al. v.* The State of North Carolina, in the Supreme Court of the United States, the same being the record of the writ of error to the supreme court of North Carolina, the statement of case on appeal in the supreme court of North Carolina may be omitted in the printing; and reference may be had for such record from the record in the said Supreme Court of the United States in said writ of error to the

record in the said Supreme Court of the United States of the appeal from the circuit court of the United States in the *habeas corpus* case, involving the same parties; it being the intention of this stipulation that the cost of twice printing said statement of case filed in the supreme court of North Carolina, involving these appellants and plaintiffs in error, may be av-ided; and that said record shall be printed only once and that in the appeal from the said circuit court of the United States.

ROB'T D. GILMER,
Attorney General for the State of North Carolina.
LESLIE A. GILMORE &
FRANK P. BLAIR,
Attorneys for Appellants and Plaintiffs in Error.

147 [Endorsed:] File No. 18512. Supreme Court U. S., October term, 1901. Term No. 313. J. L. Howard *et al.*, p'ffs in error, *vs.* The State of North Carolina. Stipulation to omit part of record in printing. Filed Ap'l 12, 1902.

Endorsed on cover: File No. 18,512. North Carolina supreme court. Term No. 313. J. L. Howard, *alias* Frank Thompson; A. L. Daly, *alias* Gonez Bono, and H. D. Hawley, plaintiffs in error, *vs.* The State of North Carolina. Filed April 23rd, 1902.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

J. L. HOWARD, A. L. DALEY and H. D. HAWLEY, *Plaintiffs in Error,* *vs.* **THE STATE OF NORTH CAROLINA,** *Defendant in Error.*	No. Error to Supreme Court of North Carolina.
J. L. HOWARD, A. L. DALEY and H. D. HAWLEY, *Appellants,* *vs.* **J. H. FLEMING, Warden, etc.,** *Appellee.*	No. Appeal from Circuit Court of the United States, Eastern District of North Carolina.

MOTION TO ADVANCE CAUSES.

Come now the plaintiffs in error and appellants in the above entitled cause by Frank P. Blair and Leslie A. Gilmore, their attorneys, and respectfully move this honorable court to advance the hearing in said causes and set the same down for argument at as early a date as may be convenient to the court; and for grounds for said motion assign the following:

That said plaintiffs in error and appellants were tried at a June Superior Court 1901 of Guilford County, North Carolina, for an alleged conspiracy, and sentenced: Howard and Daley to a term of ten years in the penitentiary and Hawley to a term of seven years in the penitentiary.

That thereafter said cause was appealed to the Supreme

Court of North Carolina, where the judgment of the Superior Court was affirmed by a divided court—three judges for affirmation and two for reversal.

That afterwards a writ of *habeas corpus* was sued out before the United States Circuit Court for the Eastern District of North Carolina, which application was granted but afterwards upon argument the petitioners were remanded, and an appeal from said order was prayed and allowed. At the same time the writ of error in the original case was allowed by the Chief Justice of the Supreme Court of North Carolina; both of such records are now in this court.

Petitioners are advised by counsel, and so being aver that the said trial and conviction by the said Superior Court of Guilford County, North Carolina, was in violation of the Fourteenth Amendment of the Constitution of the United States in this, that same was without due process of law, and that they were sentenced in violation of that provision guaranteeing all citizens of the United States equal protection of the laws of each state; all of which fully appears in the record in said causes now in this court.

This application to advance the causes is in favor of the liberty of the citizen, and it is respectfully urged that the same be granted.

All of which is respectfully submitted.

J. L. Howard,
A. L. Daley,
H. D. Hawley,
By Frank P. Blair and
Leslie A. Gilmore,
Their Attorneys.

Frank P. Blair,
Leslie A. Gilmore,
Attys. for Ptfs.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

J. L. HOWARD, A. L. DALEY and H. D. HAWLEY, *Plaintiffs in Error,* *vs.* **THE STATE OF NORTH CAROLINA,** *Defendant in Error.*	No. Error to Supreme Court of North Carolina.
J. L. HOWARD, A. L. DALEY and H. D. HAWLEY, *Appellants,* *vs.* **J. H. FLEMING, Warden, etc.,** *Appellee.*	No. Appeal from Circuit Court of the United States, Eastern District of North Carolina.

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All of which is respectfully submitted.

J. L. Howard,
A. L. Daley,
H. D. Hawley,
By Frank P. Blair and
Leslie A. Gilmore,
Their Attorneys.

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Leslie A. Gilmore,
Attys. for Ptfs.

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Clerk.

NO. ~~[illegible]~~ 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

J. L. HOWARD, ALIAS FRANK THOMPSON,
A. L. DALY, ALIAS GONEZ BONO, AND
H. D. HAWLEY, APPELLANTS,

vs.

J. M. FLEMING, WARDEN OF STATE'S PRISON OF NORTH CAROLINA, APPELLEE.

APPEAL FROM UNITED STATES CIRCUIT COURT,
EASTERN DISTRICT OF NORTH CAROLINA.

Brief and Argument for Appellants.

FRANK P. BLAIR, AND
LESLIE A. GILMORE,
Attorneys for Appellants.

Brown-Cooper Typesetting Co., 341-351 Dearborn St., Chicago.

NO. 312.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

J. L. HOWARD, ALIAS FRANK THOMPSON,
A. L. DALY, ALIAS GONEZ BONO, AND
H. D. HAWLEY, APPELLANTS,

vs.

J. M. FLEMING, WARDEN OF STATE'S PRISON OF NORTH CAROLINA, APPELLEE.

APPEAL FROM UNITED STATES CIRCUIT COURT,
EASTERN DISTRICT OF NORTH CAROLINA.

Brief and Argument for Appellants.

STATEMENT.

There are two cases before the Court involving these appellants and plaintiffs in error, numbered 312 and 313, respectively. The former comes up from the Circuit Court of the United States for the Eastern District of North Carolina by way of an appeal from an order of that Court remanding the petitioners and dismissing their petition for a writ of *habeas corpus;* the other from the Supreme Court of North Carolina on a writ of error.

Inasmuch as the questions involved in each case are cognate, and because of the poverty of the appellants, we have made but one brief and argument for both.

The appellants and plaintiffs in error were arrested, tried, convicted and sentenced at a Superior Court of

Guilford county, North Carolina, June Term, 1901, for a bare, unexecuted conspiracy to obtain money by false pretenses from one Paul Garrett, by the supposed means of what is vulgarly known as the "gold brick game." Briefly, the facts are that Howard appeared in the office of one Paul Garrett, a liquor merchant of Weldon, North Carolina, clad in the garb of a miner and affecting ignorance of letters and of ordinary affairs. He told Garrett that he had once, in Arizona, a partner named Andrew Garrett, who, some years before, had left him and gone east, and there died. Andrew had a brother, Peter, and Howard supposed P. Garrett (Paul) might be that brother. That before Peter left him, they had agreed, if either made a "strike," the other should share in it. That Howard had found a rich mine in Arizona, in which an Indian (Bono) had an interest. That they had mined it in a rough way and had taken out certain bars of bullion, worth about $36,000. The Indian had these at a camp near Greensboro; and they intended going East to sell the gold at the mint; to perfect their mining claim; and to buy machinery. Incidentally Howard had stopped over in the hope of finding the brother of his old partner, whom they wished to engage with them to aid in executing the above objects and also to keep their accounts, neither Howard nor the Indian being capable of so doing. After some negotiations Howard agreed with Garrett to engage him in this preliminary work at $25 per day, $10 as earnest money being paid down by Howard and accepted by Garrett; and for his future services to give Garrett the third interest in the mine reserved for the brother of Howard's deceased partner. An arrangement was then made for Garrett on the second day thereafter to meet Howard

at Greensboro, and go to the Indian's camp, there to inspect the bars of gold, take borings and have them tested, and to get the consent of the Indian to the agreement with Garrett. As Howard passed from Garrett's office, the latter called his clerk's attention to Howard, saying: He was "a genuine gold brick man." Nevertheless Garrett kept the appointment at Greensboro, but in the meantime sent one Mims, paying his expenses, to the authorities at Greensboro and arranged to trap Howard and the other plotters. On the way to the Indian's camp, Howard became alarmed and started to go back, but was urged on by Garrett and deceived by a lie of Garrett (312 Trans., 76). Arriving at the camp Garrett asked Howard to tell the Indian that he, Garrett, was the brother of Andrew Garrett, Howard's partner, another lie. Certain brass bars were then produced by Daley, who was disguised as an Indian, and at once the officers closed in and arrested the parties. A visiting card, bearing the name of Hawley, was taken from Howard, *after* the arrest. Returning to Greensboro, Hawley was arrested at the hotel, but not in the presence of Howard or Daley, and was asked if the card was his, but denied it (312 Tr., 93). A satchel or case was found in Hawley's room, the ownership of which he denied, containing certain assayer's blanks (312 Tr., 94), also bronzing liquid, commercial ratings of Bradstreet, and a letter addressed to "Harry," telling of his appointment to the Philadelphia mint. A hotel claim check was found on Daley's person; and, after the arrest, the authorities took the trunk from the hotel by attachment. This trunk contained (312 Tr., 102 et seq.) some maps, commercial reports, bronzing liquid, some other items, and twelve small packages of genuine gold borings. To the

introduction of the card in evidence, also the contents of case and trunk, also certain declarations of one or more of the parties after arrest, made out of the presence of others, objections were duly interposed, overruled, exceptions, and the points duly saved, assigned as error and presented to the Supreme Court.

Garrett thought there was a $20,000 reward in Virginia for these parties, and before the arrest he wrote concerning it to the Attorney General of that state (312 Tr., 88). After the arrest, Garrett went to his attorneys and caused a civil suit to be filed against the three parties arrested for $2,000 for an alleged breach of the contract to pay him $25 a day and the third interest in the mine. This suit was filed at 2 o'clock in the morning, and an attachment in aid sued out (312 Tr., 86, 87), verified under oath by Garrett, setting out that the defendants were indebted to him in that amount for the breach of the above contract (312 Tr., 86). Under this writ everything the prisoners possessed, except the clothes on their backs, was then taken (312 Tr., 103). On the criminal trial when the panel was in the box, and afterwards in the charge to the jury, the judge specially singled Garrett out for commendation; and of course defendants objected (312 Tr., 64, 119. See also dissenting opinion of Douglas, J., 313 Tr., 27). On the verdict of guilty, for this bare, unexecuted conspiracy, two were sentenced to ten years in the penitentiary, the third to seven years.

The Federal questions raised are that defendants below were denied the equal protection of the laws of North Carolina, they being citizens of the United States; that their trial, conviction and sentence were not due process of law; that their privileges and immunities as such citi-

zens were abridged, all in violation of the amendment to the Constitution of the United States.

The manner in which these questions were raised appears in the "Specification of Errors" following.

SPECIFICATION OF ERRORS.

A

The petition for the writ of *habeas corpus* sets out that Howard and Daley are citizens of Illinois, Hawley of New York, and all citizens of the United States; and that they are unlawfully detained by the warden of the State Penitentiary.

That they were indicted for a certain conspiracy, setting forth the first count.

That the acts so charged do not constitute any offense under the law, statutory or otherwise, of North Carolina.

That they moved in apt time, in the State trial court, to quash said indictment on the grounds that it was not due process of law; the trial denied them the equal protection of the laws; and that their privileges and immunities as citizens of the United States were thereby abridged; all in violation of the Federal Constitution. Which said motion was overruled.

That they then moved for a bill of particulars, in apt time. Which motion was also overruled.

That in its charge to the jury the Court refused, though requested, to charge on the presumption of innocence.

That they were convicted, and thereupon moved in

arrest, setting out the same Constitutional grounds. Which motion was denied, and petitioners sentenced, two of them to ten years, the other to seven years, in the penitentiary.

That they appealed to the Supreme Court of the State, where they urged the above Constitutional matters, but the Court affirmed the judgment.

That said indictment in truth charges no offense, that the alleged acts constitute no crime under the laws of North Carolina, and the State courts are hence without jurisdiction to try, sentence or punish your petitioners.

That the punishment is greater and different in kind from any ever heretofore imposed in said State for a like charge, and hence void because a denial of the equal protection of the laws in violation of XIV Amendment.

That said trial, conviction and punishment are hence each of them void as contrary to the said Constitutional rights repeating them.

This petition was duly signed and verified by petitioners, and the writ was ordered issued.

To this the Warden made return stating that he held petitioners by virtue of certain proceedings in the courts of North Carolina, setting them out, including the indictment, and decision and mandate of the Supreme Court.

That the Federal courts have no jurisdiction in the premises on *habeas corpus*, the remedy of petitioners being by way of writ of error.

That the punishment was not excessive, for the judge who sentenced them was in possession of the facts that Daly and Howard were charged with carrying concealed

weapons, and that they were charged with conspiracy in South Carolina and Iowa.

That the decision of the Supreme Court of North Carolina is final.

Signed and verified.

To this return an answer was filed elaborating the allegations of the petition and reiterating them, with the addition of the statute referring to the road law, hereinafter fully set out, which requires petitioners to have been sentenced to the road and forbids their sentence to the penitentiary, which latter is alleged to be in violation of the Constitution of the United States.

They deny they have cheated persons in other States, and if the Court took into consideration unfounded rumors and gossip *dehors* the record and in consequence thereof increased their sentence, such action was a denial to them of the equal protection of the laws and abridged their rights and privileges, in violation of the XIV Amendment.

Deny that the Warden's return is sufficient.

Signed and verified.

There was no evidence taken on the issues framed; but, on motion by the State, petitioners were remanded; and this appeal prosecuted.

In the writ of error the points are raised as stated in the petition as above set out.

APPELLANTS AND PLAINTIFFS IN ERROR WERE DENIED THE EQUAL PROTECTION OF THE LAWS, *because:*

1. The sentence was excessive and barbarous, such as had never before in the history of the state been inflicted in a conspiracy case; even when the criminal object of

the combination had been fully consummated. For example: It is five times greater than given for an executed conspiracy against the virtue of a young unmarried woman, the carrying out of which was practically a rape.

This question is raised in the petition for *habeas corpus,* in the traverse of the warden's return to the writ, and in the assignment of errors in this court (312 Trans. 5, 29, 53, 54).

2. The Supreme Court of North Carolina has decided that a sentence greatly exceeding in length of imprisonment that theretofore given for like offenses in that state is "cruel and unusual" within the meaning of the inhibitory provision of the State Constitution. If cruel and unusual, it must hence be a discrimination against appellants, and violative of the equal protective clause.

The point is raised in the petition, in the traverse to the return, and is assigned as error (312 Trans. 5, 6, 29, 54, par. 3rd).

3. The Statute of North Carolina provides that in all penitentiary sentences the convicted parties shall not be sent to the state's prison, but the court shall in its judgment order that they be put to work upon the highroads, provided the county in which the trial was had has a road law, except in certain specified cases. These defendants were convicted in Guilford County, which had then such a road law, and they were not in the excepted cases; yet they are now undergoing the harsher punishment in the penitentiary.

This point is raised in the petition, the traverse to the warden's return, and assigned as error in this Court (312 Trans. 6, 27, 54).

4. Howard and Hawley were discriminated against in this, that the law of the State requires all conspirators in the same combination to be punished alike; yet the two named received ten years and Daly only seven.

This point is saved in the petition, not traversed by the return, and assigned as error in this Court. (312 Trans. 4, 53.)

5. The State admits that the trial court increased the sentence because of gossip he had heard *dehors* the record. (312 Tr. 15, 31.)

B.

THE TRIAL, CONVICTION AND SENTENCE WERE NOT DUE PROCESS OF LAW, *because*:

1. The combination for which defendants below were tried was not an offense in North Carolina either by statute or at the common law. They were sentenced, therefore, in the absence of all law; and their punishment is as illegal as if inflicted by mob violence.

This point is raised in the petition, the traverse to the return, and assigned here as error (312 Trans. 3, 25, 54, Assgt. Sixth), and also in the writ of error in the motion to quash the indictment, in error assigned in the State Supreme Court, and error assigned in this Court. (312 Trans. 63, par. 7th, 123, par. 7th, No. 313, 6 Assgt. 1, pars. a, b, c, d.)

2. There was no statute of the State authorizing the infliction of this heavy sentence, and the action of the majority of the Supreme Court of the State was hence not the exercise of a judicial function, but was legislation, pure and simple.

This point is saved in the petition, not traversed by the return, and is assigned here as error, (312 Trans. 3, 54, par "fifth"); and in the writ of error, in the assignments of error in the State Supreme Court and in this Court. (312 Trans. 123, 313, Trans. 6, par. 4th.)

3. Such a punishment for such an offense has never heretofore been inflicted by the Courts of this country, Federal or State. It is hence arbitrary, capricious and void.

The point is raised as in A, 1, *supra.*

4. The sentence is so heavy and so out of all proportion to the offense as to transcend the "limits of those "fundamental principles which lie at the base of all our "civil and political institutions." It is an "arbitrary "deprivation" of liberty; it ignores the basic principle that all punishment should be proportioned to the crime: it shocks the conscience by its severity; it points to the conclusion that it was conceived in passion, and born of sectional hatred; and if persisted in, it would lead to retaliation between the States of our Union.

The point is saved as in the paragraph next above.

5. The sentence is opposed to the genius of our institutions as manifested by the legislation and decisions in the various States. The modern sentiment is opposed to judge-made crimes. When tolerated at all, small punishments only are permitted.

6. The trial Court refused, though requested, to charge on the presumption of innocence.

This point is saved in the petition, traverse to the return and in the assignment of errors in this Court. (312 Trans. 3 and 4, 26, 53, par. "third.")

7. The indictment is not due process of law because it charges no offense whatever.

BRIEF AND ARGUMENT.

When this case was called in the Superior Court of Guilford County, the defendants had no reason to believe that their trial would not be fair, or that the Court would violate any of the rights secured them by the Fourteenth Amendment to the Constitution of the United States. However much their expectations may have been disappointed in the conduct of the proceedings and in the sentence by the *nisi prius* judge; still they believed, and their counsel with them, that in the Supreme Court of the State their rights and the law would be vindicated. In the opinion of counsel, the errors committed on the trial were so many, so gross and so palpable that there was no thought of any other result than reversal. In part their opinion was sustained by the minority of the higher tribunal. Counsel had the right to rely on that Court to protect their clients in their constitutional rights, State and Federal. So relying, Federal questions were presented only perfunctorily *as* Federal questions by way of exceptions. They were urged in argument before the Court, as appears by the allegation in the petition, which stands uncontradicted. (312 Tr. 4 and 5.) But though they were not raised (with one exception) *eo nomine* as Federal, yet the errors relied on in this court were fully presented and argued in that tribunal. In the motion to quash the indictment it was alleged, among other matters, that the indictment charged no crime, either at common law or by statute, and that it was defective in being so vague as not to apprise defendants of the charge

against them. Exception was duly taken to the refusal to grant a bill of particulars; to the refusal to charge on the presumption of innocence; and to the excessive sentence. On appeal error was assigned in the State Supreme Court, among others, on the points just mentioned. In these errors are included most of the violations of the Fourteenth Amendment complained of in the petition for the writ of *habeas corpus*. It is manifest from a reading of the opinion of the Court that, no matter how the Federal questions might have been raised, nor how strenuously insisted on, the decision would have been the same.

We are aware of the general rule of this Court that ordinarily such questions should be presented in apt time to the State tribunals and in apt language; the reason for that rule being, as we understand it, that on *habeas corpus* the prisoner must be discharged altogether, if the petition be sustained, while on a writ of error, the plaintiff in error, in certain contingencies, may be sent back for a re-sentence. We submit, however, that if the contentions here presented be sound, the prisoners must be discharged, whether their case be here by *habeas corpus* or writ of error. This court has more than once permitted the *habeas corpus* proceedings and the writ of error to proceed concurrently. Ex parte Frederich, 149 U. S., 70; *Whitten* v. *Tomlinson,* 160 U. S. 242; *Markuson* v. *Boucher,* 175 U. S. 186.

Believing as we do that a monstrous injustice has been done, we appeal to this Court to rectify it, confident that "not the weight of a judge's finger shall rest" upon these men except by strict command of the law. We have nothing to say in commendation of them. That

they intended to get money through Garrett it were foolish to deny; but no crime has been legally charged against them and no crime has been proved against them. Rights secured by statutes and by Constitution were refused them. The blackest criminal has as strong a claim to the due and orderly administration of the law as the blessed martyr. No otherwise can a free country exist.

In this case attention is respectfully called to the various opinions rendered by the Supreme Court of the State. The Court consisted of five judges and there were four opinions. The majority opinion was rendered by Judge Clark, with whom concurred Faircloth and Montgomery, J. J., if the opinion of the latter be really a concurrence. "He thinks" that some of the remarks of the trial judge were "inappropriate and indiscreet"; "the "language of the statute may not have been violated, *but "its spirit certainly was"* (italics ours). See 312 Tr. 20. The main dissenting opinion is by Judge Douglas, concurred in as to result by Furches, C. J. This opinion is a vigorous dissent, and numerous fatal errors are pointed out, so great and so numerous, says this judge, that their "combination * * * renders it morally impossible "that they (the defendants) should have had such a trial "as they are entitled to by the 'law of the land.' "

An examination of the pleadings in No. 312 will disclose that the petition for the writ of *habeas corpus* raises practically all the questions to be submitted to this Court (312 Tr. 1 et seq.). In the return to the writ, the warden of the penitentiary traverses only one allegation of the petition, namely the charge that the punishment is greater than ever awarded in that State for a like offense (312 Tr. 14), saying that "the punishment is "not unusual, and is, as he advised, fully authorized by

"the laws of the state," etc. As to the manner of impanelling the jury, grand and petit, he says, while admitting the facts, that custom was followed. (312 Tr. 12, 13.) *He justifies the heavy sentence by stating that* the trial judge was in possession of various rumors, *dehors* the record to the criminal history of defendants. (312 Tr. 14, 15.) Thus it appears that the petition remains substantially not denied. Under the rulings of this court, all allegations in the petition for the writ not traversed are admitted, if petition be verified as in this case. (See order of court 312, Tr. 7.) *Whitten* v. *Tomlinson*, 160 U. S. 231; *Kohl* v. *Lehlback*, 160 U. S. 293.

In the answer of petitioners to the return, the allegations of the petition are elaborated, and some new matter responsive to the return is added. No attempt was made by the warden to frame an issue of fact or to introduce evidence; and on motion, the prisoners were remanded. This motion was the equivalent of a demurrer to the answer of petitioners, and, on elementary principles of pleading admitted all facts well pleaded. See Church on *Habeas Corpus*, 2nd Ed. §§ 159, 160, 161 and cases cited.

The admitted facts, therefore, are the following: 1. That the trial court deliberately took into consideration gossip and rumors *dehors* the record, and increased the sentence in consequence thereof; 2. That the motion to quash the indictment and the motion for a bill of particulars were each denied; 3. That the prayer for an instruction to the jury on the presumption of innocence was denied; 4. That the Court, in effect, charged the jury that defendants were guilty; 5. That in argument

before the State Supreme Court the foregoing points were urged upon the Court as being in violation of the Fourteenth Amendment to the Constitution of the United States; 6. That the sentence was greater than ever inflicted for a like offense in the State; 7. That under the road law and the statute of the State, the *duty* of the Court was to sentence defendants to work on the roads of Guilford County, and not to the penitentiary.

These points, except 2, were not noticed in the opinion of the Supreme Court of North Carolina, and hence are taken to have been decided adversely to plaintiff in error, and against the Federal protection invoked.

With respect to the inhibitions of the Fourteenth Amendment, it makes no difference by what branch or instrumentality of the State government they are violated, the Federal Courts will protect the citizen of the United States in any event. *Chicago, B. & Q. R. R.* v *Chicago,* 166 U. S. 226; *Scott* v. *McNeal,* 154 U. S. 34.

The judgment being in violation of the Constitution is utterly void.

A.

THE DEFENDANTS BELOW WERE DENIED THE EQUAL PROTECTION OF THE LAWS.

1. *The sentence is more severe than ever inflicted in that State for a like offense.*

Pretermitting for the present the provision of the North Carolina Constitution relating to cruel and unusual punishments, we rest for the moment on the proposition that the sentence is more severe than ever inflicted in

that State for a like offense. It is equal to the maximum denounced by the Legislature of North Carolina for a conspiracy to overthrow by force the government or to levy war against the state!

In *State* v. *Powell*, 121 N. Car., 635, the alleged conpiracy was to procure a seventeen year old girl by false pretenses to leave her home for the purpose of prostituting her. The scheme was successful, and the girl was actually debauched. For this unspeakable crime the sole defendant tried was sentenced to *two years* on the roads. It appears from the report that the co-conspirator was Lulu Powell, presumably the wife of Marion Powell, who alone was tried. The crime was thus one of "peculiar atrocity"; the woman entering into the combination made it easier to lure the trusting girl to her ruin.

In *State* v. *Wilson*, 121 N. Car., 650, the scheme was the same, the false pretenses being a mock marriage, invalid by the laws of the State. This, too, was carried out, and the women were prostituted. The report shows the sentence only as to Wilson. The judgment recites that he had been previously indicted for shooting a man in the arm, breaking it, "without justification or provo-"cation"; that he had been indicted for carrying concealed weapons, pleading guilty to both charges and judgment suspended (it is intimated through malfeasance of the State's solicitor); that he was "a notorious violator of "the law and openly defies the law and its process" (p. 653). Under these circumstance, comparing the punishment inflicted on these appellants for their bare, unexecuted conspiracy, one would suppose that hanging, drawing and quartering would be the least Wilson could expect, and that he might congratulate himself to have

escaped the *"peine forte et dure."* However, he got *two years on the road.* From the recitals in the judgment above set out, the sentences of the other defendants must have been much lighter.

What a commentary are these two cases on the morals of a community which can complacently view such trivial punishments for such hideous crimes. We cannot forbear quoting in this connection from our brief in the Supreme Court of North Carolina:

"Shall it be said of this great State, among whose "founders were Monk, and Clarenden, and Shaftsbury, "whose first legislator was John Locke, whose early set- "tlers resisted, under Culpeper, the enforcement of the "odious navigation laws, anticipating New England a "full century in a revolt against tyranny, * * * "shall it be said of her, I say, that she has come to this: "that she is five times more solicitous to protect the paltry "dollars of the wine merchant Garrett than to guard the "virtue of her women! Or are we to infer that she has "one measure of punishment for her own citizens, though "they be 'notorious violators of the law and openly defy " 'the law and its process,' and another and harsher meas- "ure for the strangers within her gates?"

State v. *Jackson,* 82 N. Car., 565, was a conspiracy to charge a woman with "infanticide and to cause her "to be arrested, prosecuted and punished therefor." The defendants were sentenced to ten, eight and five years in State's prison, respectively, though as the Court say, p. 569, the crime was "one of peculiar atrocity in the "object aimed at and in the means contemplated and at- "tempted to accomplish that object." Judgment was reversed, because the *punishment was in excess of that per-*

mitted by the law as then construed by the court; and also because the law did not authorize different terms for different defendants. It should be noted that this case, besides being one of "peculiar atrocity," was also strictly within the Edwardian conspiracy statutes, hereafter to be examined, and contemplated the perversion of justice by perjury.

State v. *Mallett,* 125 N. Car., 718, was a conspiracy to defraud. Defendants were sentenced to two years in the county jail. (See *Mallett* v. *North Carolina,* 181 U. S. 589.)

Comparing this sentence with the punishments prescribed by the Legislature for the three statutory conspiracies known to the laws of North Carolina, we find the maximum for a conspiracy to abduct a child is fifteen years, R. C. § 974; the maximum for a conspiracy to embezzle funds of a railroad by its employees, and a conspiracy to levy war against the State is ten years. Laws 1870-1, ch. 103, § 2; Rev. Code, § 1107.

This Court has repeatedly said that the Fourteenth Amendment prohibits a "different or higher punishment "to be imposed on one than is imposed on all for like "offenses." *Re* Kemmler, 136 U. S., 436; *Caldwell* v. *Texas,* 137 U. S., 692; *Connolly* v. *Union & C. Co.,* 184 U. S., 540.

2. *The sentence is "cruel and unusual," within the meaning of the State Constitution; and hence discriminates against defendants below.*

In *State* v. *Driver,* 78 N. Car., 423, it was held that a sentence of five years in the county jail and a recognizance of $500.00 to keep the peace thereafter for five years for wife beating was "cruel and unusual," and the

case was reversed. The principle of this case is that where a sentence greatly exceeds the punishment inflicted usually in that State in like cases it becomes cruel and unusual and hence unconstitutional. This is a different meaning of the phrase from the construction put upon the same language in our Federal Constitution; but the ruling is exceedingly apposite to the case at bar. If the sentence is "cruel and unusual," it certainly comes within the inhibition of this Court as being a "different" and "higher punishment" than is usually imposed for like offenses *In re* Kemmler, *supra*.

It is worth while to quote one extract from the opinion of the Court in the Driver case to show just the attitude assumed in this connection. After stating the case and the constitutional provision, together with certain statutes, the Court refers to 3 Story on Const., § 1896, and to the fine of £30,000 imposed on the Duke of Devonshire by King's Bench for his assault on Culpeper (a fine dictated by the malice of James II.) and its review, after the Revolution of 1688 by the House of Lords; Judge Reade says: "Thus it appears, both by prece-"dent and by the reason of the thing, and by express "constitutional provision, that there is a limit of the power "of the judge to punish, even when it is expressly left "to his discretion. What the precise limit is cannot be "prescribed. The Constitution does not fix it, precedents "do not fix it, and we cannot fix it, and it ought "not to be fixed. It ought to be left to the judge "who inflicts it under the circumstances of each case, "and it ought not to be abused, and it has not been abused "(grossly) in a century, and probably will not be in a "century to come, and it ought not to be interfered with, "except in a case like the present, where the abuse is

"palpable. And when that is the case, then the sleeping "power of the Constitution must be waked up to pro- "tect the oppressed citizen. The power is there, not so "much to draw a fine line close up to which the judges "may come, but as a 'warning' to keep them clear away "from it."

3. *The penitentiary sentence was a denial of the equal protection of the laws.*

The statute of North Carolina provides: "Sec. 1. "That when any county has made provision for the "working of convicts upon the public roads, or when "any number of counties have jointly made provision for "working convicts upon the public roads, it shall be law- "ful for, and the duty of the judge holding Court in such "counties, to sentence to imprisonment and hard labor on "the public roads for such terms as are now prescribed "by law for their imprisonment in the county jails or "in the state prison, the following classes of convicts: "First, all persons convicted of offenses the punishment "whereof would otherwise be wholly or in part impris- "onment in the common jail; second, all persons con- "victed of crimes the punishment whereof would other- "wise wholly or in part be imprisonment in the peniten- "tiary for a term not exceeding ten years."

"Sec. 4. That in all cases where the judge presiding "shall be satisfied that there is good reason to fear that "an attempt to release or to injure any person convicted "of any of the offenses mentioned in section one of this "act, class second, it shall be lawful for the judge to sen- "tence such convicts to imprisonment in the penitentiary, "as is now provided by law: *Provided,* That no person "who has been convicted and sentenced on a charge of

"murder, manslaughter, rape, attempt to commit rape, "or arson, shall be assigned under this act." Law N. Car. 1887, p. 630. The act shall not apply to certain counties named, not mentioning Guilford County. The latter County adopted the road act Sept. 4, 1894. (312 Trans. 48, 49.)

On the plainest principles of criminal jurisprudence it was the duty of the trial court to sentence the defendants below to work on the roads, or else to recite in its judgment the reasons why he made the judgment a term in the penitentiary. The judgment should have contained a recital bringing it within the provisions of Sec. 4 of the act; otherwise the act itself might well be a dead letter.

4. *By reason of the unequal sentence, Howard and Hawley were denied the equal protection of the laws.*

The two named received a sentence of ten years in the penitentiary, while Daley received seven years. There is absolutely no difference in the guilt of the various defendants, if they were guilty at all. The evidence shows that Howard was the spokesman, Hawley was the assayer (his connection was of the very slightest), and Daley played the Indian. If these men were engaged in a conspiracy to cheat and defraud Garrett, then all are equally guilty and there are no degrees of culpability; but the trial judge capriciously gave a lighter sentence to one than to the others. This was in violation of the rule laid down in *State* v. *Jackson*, 82 N. Car., 565, and was one of the errors on which that case was reversed. In the opinion by Judge Clark in the case at bar no mention is made of this point, though it was urged in our brief and the Jackson case cited. It was probably one of very many exceptions which the learned judge, with-

out mentioning specifically, contented himself with saying they were "without merit," (Tr. 313, p. 18); an easy, if somewhat unsatisfactory, method of answering the argument of counsel.

5. *The Judge allowed the tittle-tattle floating round the Court-House, and dehors the record, to influence his judicial discretion, and to cause him to increase the punishment.*

This stands admitted by the State. Not admitted by failure to deny, but actually and solemnly alleged affirmatively in order to justify this oppressive judgment!

They were wanted in Iowa! They were wanted in South Carolina! And some busy Mr. Wheeler goes to the jail and recognizes them as having swindled him! (312 Tr., p. 15.) And where and to whom did he impart this discovery? Not under the sanction of an oath, nor under the penalty of cross-examination. Did he "sit at the ear" of the judge, "squat like a toad," and pour his venom in there? There was no hint or whisper, at the trial, of these various other conspiracies; there is nothing in the record about them; and they were simply so many stabs in the back, with no chance to defend. Did some assassin whisper in the judge's ear in the Powell and Wilson cases, perchance, that the victims there were only harlots, and hence two years or less would be punishment enough for their violation? It is not easy to write temperately about such a proceeding.

There is no law in North Carolina increasing the punishment of habitual criminals; and if there were it could not apply to extra-territorial crimes. There is no law in that State authorizing the Court to hear evidence of bad character to enhance the sentence; and if there

were, no such evidence was heard on the trial and defendants given an opportunity to meet it. It remains that the State expressly alleges that these heavy sentences were imposed because of information given to the Court *in secret* and in the absence of the defendants. It is true that the return alleges that "it appeared to the Court" that requisitions had issued and that a Mr. Wheeler identified defendants, etc. Counsel cannot mean that such facts appeared to the Court at the trial, *for they did not* in truth, and the record shows they did not. Defendants were wholly ignorant that anything of the kind was going on. It was simply an instance of the Dreyfus secret *dossier*.

Finally, the inquiry is pertinent, What has North Carolina to do with punishing crimes committed in Iowa? Our impression is that Iowa would say she is capable of attending to her own criminals. And how monstrous, too, to enhance the punishment in this case because these men had committed offenses in other States. Would it avail them in mitigation to plead that fact hereafter in South Carolina?

It is insisted that this is a clear violation of the XIV Amendment in that it denied defendants the equal protection of the laws, and was not due process of law. The points are raised in the answer to the return (312 Tr. 31).

If such a thing can be tolerated to enable the Court to assess the punishment, why may it not be done to determine guilt or innocence? And would the latter be due process of law?

Jeffreys was known in many cases to get the pleasure of the King before forcing a conviction!

B.

THE TRIAL, CONVICTION AND SENTENCE WERE NOT DUE PROCESS OF LAW; because,

1. *The alleged offense was not a crime either at common law or by statute of North Carolina.*

It was conceded by the majority opinion that no statute of the State covered this offense; and, in order to convict, recourse must be had to the common law. The statute of North Carolina relating to the adoption of the common law is as follows: "All such parts of the com-"mon law as were heretofore in force and use within this "State, or so much of the common law as is not destruc-"tive of, or repugnant to, or inconsistent with, the free-"dom and independence of this State and the form of "government therein established, and which has not been "otherwise provided for in whole or in part, not abro-"gated, repealed or become obsolete, are hereby declared "to be in full force within this State." 1 Code N. C., 1883, § 641.

The proposition now urged upon this Court is that a combination or agreement to cheat and defraud was not a punishable conspiracy at common law. The statement can with all safety be made broader. There was no such offense as conspiracy known to the common law. The crime originated in certain statutes of Edward I., was amplified by statutory law in the time of Edward III., and subsequent reigns; but never had any existence, save by statute, in the English law, until well on in the Stewart dynasty, when the judges began to legislate in that behalf. Until that time, conspiracy comprehended only combinations to commit champerty, em-

bracery and maintenance; combinations falsely to appeal men of felony; and combinations among wool merchants to control the price of the staple. There were also statutes, mainly in Elizabeth's time, denouncing combinations among laborers.

The deduction from this proposition is that there being no law of conspiracy, statutory or common, in North Carolina covering this offense, defendants were simply tried by a mob and not by due process of law.

We have endeavored to show at great length in subdivision 7, *infra,* that the Federal Courts are not bound to follow State adjudications on any general principle of the criminal law known to the common law. If our argument in that behalf is valid and sustained by the precedents cited and by right reason, then it follows that this Court does not have to take the definition of the majority of the North Carolina Court in this case of a common law conspiracy, but is free to determine for itself what the term includes and whether or not there was such an offense at common law. If it should determine that the acts charged in this indictment were no offense at common law, the prisoners should be discharged.

(a) *The English Common Law of Conspiracy.*

The legal concept that it is a crime for two or more to combine to commit some act, though the object of the agreement is never carried out, or as the old books say, "tho' nothing be put in ure," originated, we believe, in the Anglo-Saxon Jurisprudence after the Conquest. It is not found in the ancient laws of Normandy, where one would naturally seek its origin. It is not in the Grecian nor Roman systems; nor in the Brehon laws; nor in the

early Germanic nor Salic laws; nor in any system of jurisprudence in ancient or medieval times, so far as we have been able, after diligent search, to ascertain.

Beginning with the Norman Conquest, we find no trace of it in England in the period covered by Dr. Bigelow's admirable collection of cases, "Placita Anglo-Normannica," from A. D. 1066 to A. D. 1195; nor in *Leges Henrici, circ.* 1118. There is no hint of it in the Select Pleas of the Crown, Selden Soc. A. D. 1200 to A. D. 1225; nor in the 2,000 cases in Bracton's Note Book, from A. D. 1200, to *circa* A. D. 1240 (the case, No. 479, indexed under "conspiracy," in Prof. Maitland's Ed. is not a conspiracy); nor in Glanville, who wrote between 1187 and 1189; nor in Bracton's treatise, "The Crown and Flower of English Medieval Jurisprudence" (1 Pollock & M. Hist. Eng. Law, 206) written about 1250 to 1258; nor yet in Britton nor Fleta, both about 1290.

It is a strong presumption that no such offense existed at common law, that, in all the materials now at hand covering the period, of more than two centuries after the Conquest, we find no single suggestion of it until we come to the statutes hereinafter examined. The presumption becomes well nigh indisputable when we see numerous cases touching accessories in the same and earlier periods. "Anglo-Saxon law knows the slayer by rede, as well as the slayer by deed." 2 Pollock & M. 509.

In Bracton's time, he who advised the killing was a slayer himself; but Bracton also gives another maxim, that unless the party has *acted* on the advice or command there is no crime. "*Ubi factum nullum, ibi forcia nulla.*" Bracton, ff. 142, 139. The rule in Bracton's time in cases where a party of men under a leader committed a

crime, such as murder, robbery or the like, was for the leader to be tried first, and, if acquitted, his associates went free. These latter were called his *"alia";* the title "conspirators" is never used. See illustrations in 1 Select P. C. (Seld. Soc.), cases 4, 9, 76, 84, 155, 164, 197.

It is hard to reconcile this common law maxim with the doctrine of 27 Ass., 34, 44, where the conspirators were punished, though nothing was put in execution; unless indeed the law of conspiracy was something which came after Bracton's time, by way of a statute; as, for example, 33 Edw. I., in which case the whole matter becomes luminous.

A word as to the situation of that period, disclosed by our histories, will, we think, strengthen the argument.

After Edward I. had become accustomed to his throne, he undertook numerous judicial reforms. It was not until then that the great courts are becoming definitely separate; and from that time dates the sharp struggle between the King's courts and the local courts for jurisdiction. The barons resented the ever increasing interference with their own tribunals. "This is my warrant, my masters," said Earl De Warrenne, throwing down his sword in the face of the King's Bench. When Edward proved too strong for open resistance, fraud, chicanery, maintenance were used to evade or to bring into contempt the new courts. At this time also the ordeal was passing, and the jury had arrived. For a time its struggle for existence was precarious. The new process by indictment was just devised, and crime was becoming to be recognized as an offense against the King, and not merely a private wrong. The situation was critical. We can now to some extent appreciate why Edward and his im-

mediate successors passed statute after statute defining and punishing maintenance, champerty and conspiracy, and providing civil remedies therefor. They were necessary to prevent the judicial reforms from being swept away. We can see, too, from the historical standpoint why it is an anachronism to say that the offenses named were, before that time, known to the common law. How could a jury be embraced before there were any juries? Were a man's compurgators, conspirators? How could there be maintenance in a trial by witnesses? In truth these offenses grew out of the trial by jury, and beyond doubt the writ of conspiracy was invented to be used against persons abusing the new process of indictment. See 3 Stubbs, Const. Hist. 575 *et seq.;* 1 Pollock & M. ch. VII.; 2 id., 539; Thayer, Predim. Treat. on Ev., ch. 1; 2 Social England, 32; 2 Reeves Hist. Eng. Law. 126, 457.

The statutory enactments clearly reflect the situation as we know it historically.

By 3 Edw. I., ch. 25 (West. 1, 1275) champerty by the King's officers was prohibited; and by ch. 28 of the same act any "clerk of any Justicer or sheriff" was forbidden to maintain "quarrels of matters" depending "in "the King's Court."

In West. 2, c. 49 (1284, 13 Ed. I.) champerty and simony by the chancellor, treasurer, justices, any of the King's Council, clerks of chancery and of the exchequer, and justice or other officer, or any of the King's house, clerk or lay, were prohibited; and offenders "punished "at the King's pleasure, as well he that purchaseth as he "that doth sell." This, Coke said, was merely an extension of West. 1, c. 25 (*supra*), because it was doubted

whether the word "King's officers" (*nul ministre le roy*) would include persons of such eminence as those named in West. 2, without special mention.

By Cap. 12 West. 2 (13 Ed. I., 1284) it was recited that inasmuch as many persons maliciously procure false appeals to be made by appellors who are pecuniarily irresponsible, it is therefore provided that if the appellee be acquitted in any case, and the appellor be found unable to respond in damages, then the justices shall enquire by whose abetment or malice the appeal was commenced: and if it be found by "the same inquest that any man "is abettor through malice," he shall be distrained and mulcted at suit of the acquitted party and imprisoned.

In the twentieth year of his reign (1292) a statute entitled "Statutum de Conspiratoribus" prohibited champerty and maintenance and provided that such as were "attainted of such emprises" should be imprisoned for three years and fined at the King's pleasure. A civil writ was also provided and the form thereof given. This writ ran to any who would "complain himself of con-"spirators, inventors and maintainors of false quarrels "and brokers thereof and brokers of debates"; while the form of the writ given provided that anyone who would give surety for prosecution "of a plea of *conspiracy* and "trespass according" "to our ordinance" should have the writ.

In c. 10 of *Articuli super Chartas* in the twenty-eighth year of this reign (1300) it was enacted that, in addition to the writ out of Chancery theretofore provided for plaintiffs against "conspirators, false informers, and evil "procurers of dozens, assises, inquests and juries," such writ should run from either court and from the Justices

of the Assises on circuit. This statute, so far as conspirators were concerned, merely facilitated the getting of the civil writ, and gave jurisdiction thereof to King's Bench and the justices in eyre in addition to the chancery.

By the next chapter (28 Ed. I., c. 11) the offense of maintenance was extended to embrace all persons whatsoever, whether officers of the King or not, excepting, of course, attorneys and next friends.

In 33 Edw. I., A. D. 1305, we find the famous "Ordi-"nance concerning Conspirators," as follows: "Con-"spirators be they that do confeder or bind themselves "by oath, covenant or other alliance, (1) that every of "them shall aid and (bear) the other falsely and mali-"ciously to indite (or cause to indite) or (2) falsely "to move or maintain pleas; (3) and also such as cause "children within age to appeal men of felony whereby "they are imprisoned and sore grieved; (4) and such as "retain men in the country with liveries or fees for to "maintain their malicious enterprises; and this extendeth "as well to the takers as to the givers; (5) and stewards "and bailiffs of great lords, which by their seignory, "office or power undertake (to bear or maintain quar-"rels, pleas or debates that concern other parties) than "such as" touch the estate of their lords or themselves. "This ordinance and final definition of conspirators was "made and accorded by the King and his Council in "his parliament in the thirty-third year of his reign."

"Champertors be they that move pleas and suits, or "cause to be moved, either by their own procurement, or "by others, and sue them at their proper costs, for to have "part of the land in variance or part of the gains."

By 1 Edw. 3, § 2, c. 14 (1327) it is provided that "because the King desireth that common right be admin-"istered to all persons, he commandeth and defendeth" that no persons, high or low, "shall take upon them to "maintain quarrels * * * to the let and disturb-"ance of the common law."

By 4 Edw. 3, c. 11 (1330) it is recited that divers people and great men "have made alliances, confederacies "and conspiracies to maintain parties, pleas and quarrels," hence it is provided that either bench and the justices of assises shall take inquests at suit of the King or of parties and determine of "such maintainers, bearers and con-"spirators" and champetors.

By 18 Edw. 3 st. 1 (1344) process of exigent is given against absconding "conspirators, confederators and "maintainors of false quarrels."

20 Edw. 3, c. 4 (1346) is in affirmance of sts. 1 and 4 preceding, with some additional details.

By 27 Edw. 3, st. 1, c. 1 (1353) it is provided among other things that "maintainors" shall be put out of the King's protection, their lands and goods forfeit and their bodies taken and imprisoned.

By 27 Edw. 3, st. 2, c. 25 (1354) it is forbidden for merchants to make "conspiracies, confederacies, &c., and "ill device" for disturbance, impeachment, &c., of the staples on pain of death. This is the only statute in the long line relating to any other matter of conspiracy except to pervert justice.

By 1 Ric. 2, c. 4 (1377) none "shall henceforth take "nor sustain any quarrel by maintenance * * * upon a grievous pain" prescribed by the act.

By 7 Ric. 2, c. 14 (1383) it is recited that "grievous "complaint is made of maintainers of quarrels and cham- "petors" and therefore statutes 1 Edw. 3, st. 2, c. 14: 4 Edw. 3, c. 11; and 1 Ric. 2, c. 4, are confirmed.

32 Hen. 8, c. 9 (1540) makes elaborate provisions against maintenance, champerty and embracery, reaffirming all statutes made "concerning maintenance, cham- "perty, and embracery or any of them."

An examination of the foregoing statutes shows that for a period of considerably more than one hundred years the two great Edwards and Richard II. were repeatedly legislating against the crimes of champerty, embracery, maintenance and conspiracy; and that in their minds the four offenses were but different phases of the same general crime, namely the crime of perverting justice. It is difficult at this late date to realize the intensity of the struggle between the King and his Courts on the one side, and the feudal lords on the other, from the accession of Edward in 1272 to that of Henry VIII. in 1509; yet without such realization we cannot fully understand the legislation and judicial decisions of that period on the topic now under discussion. It was the struggle between law and order on the one side, and semi-anarchy on the other; between the jurisdiction of the King's Courts, and the lawlessness of the barons; between the centralization of power in the King and his parliament, and the fiercely claimed independence of the feudal lords. These crimes struck at the very vitals of the growing nation. Either English Courts were to become supreme and England a homogeneous world power, or she was to split up into little principalities. The issue remained doubtful for five centuries after the Conquest, and it was not until

the strong hand of the Tudor dynasty took the helm that the Ship of State sailed out into the broad waters of Empire.

The first reported case on our topic in English law occurred in 1351, and was error sued out of King's Bench to reverse a *judgment given in Circuit* on a presentment of conspiracy. The charge was that a man and his son had conspired to imprison another until he should pay a fine. After passing on a technical point, the Court says: "And moreover because the principal matter of "the conspiracy alleged is not conspiracy, but rather dam- "age and oppression of the people. Wherefore we reverse "and annul the judgment." Y. B. 24 Edw. 3, p. 75.

In 1354, in the Articles of Inquest, we find: "Note: "that two were indicted of confederacy, each to maintain "the other, whether their matter was true or false, and "notwithstanding that nothing was put in ure, the parties "were held to answer, because this thing is forbidden by "the law." (*Defendu en ley*, i. e., criminal.) 27 Ass., 44. See, also, almost precisely the same language in 27 Ass., 34. This is the first recorded case, so far as extant documents go, in which a conspiracy was criminally punished.

Next in order of time is the case of 1365 in which one sought to get a civil writ against several for having conspired to forge a deed of release and to put the same in evidence, which they did, whereby the petitioner for the writ had lost his case; and Thorp said: "And do "you pray that you have a writ of conspiracy on the "ground of an evidence? You shall not (have it)." Y. B. 39 Ed. 3, p. 13 a.

Be it observed that the civil action was much broader

than the criminal, as shown by the Statutes 20 and 28. Edw. 1. It included a remedy of damages against those who falsely caused one to be indicted of a trespass. (See 3 Ass., 13.) And hence, if no civil action lay for conspiracy, *a fortiori,* no indictment would lie; though unfortunately many courts have cited cases of civil action as precedents in the criminal cases. To be a little more specific, we mean by this that there were more *subjects* enumerated by the statutes for which the writ lay than there were on which indictments could be predicted. Thus, as stated, an action lay for a conspiracy to commit a trespass, in its medieval sense (quite different from its modern meaning), yet it was not indictable. On the other hand, sometimes, prior to 1611, an indictment might properly be brought when the writ would not lie: but this, as we shall show hereafter, was because the conspiracy had not been completed, and hence the plaintiff had not suffered any damages, in the medieval sense.

In 19 R. 2 F. Briefe 926 (1395) several brought a writ of conspiracy against J. and others. The writ contained the allegations "confederated" and "conspired." The writ was held bad, because *two* could not join as plaintiffs in a writ of conspiracy, the injury being several. "Rik. (Rickhill, Justice, spelled Rickel, Rikel and "Rickhill.) The imprisonment of one cannot be the im-"prisonment of the other, by which you take nothing by "your writ," etc. Gascoigne (afterwards immortalized by Shakespeare in Henry IV.) as counsel, made the point of improper joinder of plaintiffs, on which the case turned. In another place in the book the case is stated: "Two were indicted, &c., and they brought a writ of "conspiracy. The writ was they confederated and con-"spired, also, &c. *Wad.* A man will have a writ of

"conspiracy although they (i. e., the conspirators) do "nothing but confederate together, and he will recover "damages. And they can be indicted of this also. But "for this that their grievance is several and they brought "their writ in common, it was abated." The case is reported in Bellewe, Cas. temp. Ric. 11, at pp. 80 and 108.

Next we come to the case of *Sydenham* v. *Keilway* (1574), which is reported as follows: "Popham, Ch. J., "cited a case to be resolved by all the Justices, Anno. "16 Eliz. *Sydenham* v. *Keilway*, that where two conspire "to indite one falsely, and the party is not indicted be- "cause the jury had not sufficient evidence, but returned "an '*Ignoramus*' upon the bill, no (writ of) conspiracy "lies, because he never was indicted nor acquitted; yet "he may be indicted upon conspiracy at the common law "for this false conspiracy and misdemeanor, which is "punishable at the common law." Cro. Jac. 7 (Case 9).

Ameridith's Case, Moore 562 (1599) was an information in Star Chamber for a conspiracy, under the second paragraph of 33 Edw. 1, by certain of Ameridith's tenants, who agreed among themselves to contribute to suits brought and to be brought respecting certain freeholds and copyholds of inheritance. And because they had no common interest in the lands so held "they were fined "for the combination, and maintenance and the taking of "obligations, one from the other." Otherwise would it have been if "by custom in which they all participated in "common" their interest had been mutual.

The case of Lord Grey of Groby, Moore, 738 (1607) in Star Chamber was one in which the lord complained of his tenants because they joined in the expense of a

petition to the King on the Customs of the Manor. The Court took the distinction between the case in which all tenants were interested in the same custom; and the case where the question was one of tenure. In the first they might share the expenses and not be guilty of the offense of maintenance; but not in the second; because the tenure of one is not the tenure of all. And because the tenants claimed a custom that all the copyhold tenures descended for life to the eldest son of the deceased copyholder, or to his daughter, in default of a son; the Court, by Popham, held that it was "an illegal combination."

This review exhausts, we believe, the cases on conspiracy from the Conquest to the Poulterers' case (1611).*

From these cases a distinction is to be noted as having been taken by King's Bench, which was perfectly plain to the Courts until the eighteenth century is reached, but which has been greatly misconceived since.

The language of all the statutes requires the object of the conspiracy to have been completed; or, if not the precise language, yet the necessary implication; and this was the construction adhered to by the Courts in cases of conspiracy, properly so called. That is to say, before several could be appealed or indicted of a conspiracy to indict or appeal a man, the latter must have been acquitted *legitimo modo*. But in 27 Ass. 34, 44, a new doctrine was announced; namely, that nothing need be "put in ure" as to these conspiracies, for the agreement to be

*We say we believe the review to be exhaustive; but those who are familiar with the Year Books well know how defective are their indices. On these, however, we have necessarily relied; except as to the Book of Assises. This we have examined page by page. There are in it some very interesting conspiracy cases deciding various questions: whether the commissioned Justice or the indictors could be conspirators; the right to try one conspirator in the absence of the others, and the like. But none of these touch the matter under discussion, namely: What is the essence of the offense? They are all, however, either for maintenance or for falsely indicting for felonies.

indictable; and they took this distinction; a conspiracy is divided into two parts; (a) the agreement falsely and maliciously to &c., (b) the execution of that agreement, as by an appeal or an indictment of the victim of the conspiracy. After having proceeded as far as (b) the conspirators were safe from an indictment for a "conspiracy" (note the word) unless and until the victim were found "not guilty" on the merits. It would not suffice for him to save himself on a point of law or even a successful plea of self-defense in an appeal of murder; he must be *legitimo modo* acquitted. But suppose the parties had agreed to maintain each other, true or false; here surely must be an offense within the mischief of the Statute. And so the Judges made the division above indicated; and said this false "confederacy" (a) was a crime; or, as we would say now, the completion of it was but the "overt act" of the "confederacy," and the "false confederacy," without this overt act, was punishable at *Common Law*. They did not for one moment conceive that *every* "false confederacy" was punishable at Common Law, but only those confederacies which were the agreements precedent to the specified *Statutory conspiracies*.

The distinction was well understood by Coke, and is especially insisted on by him in his comments on and summary of the Poulterers' Case. Holt, C. J., observes the difference in the Best case (1691) *infra;* and it was not until well on in the 18th Century that the distinction was ignored; then text writers and some courts seized upon the word confederacy, dislocated it from its connection, and tortured it into the meaning that "confederacy," that is "combination," that is "conspiracy," was a common law offense. Thus by an easy transition they

concluded that *all* combinations were denounced as crimes by the Common Law.

The proposition is so important that we shall try to restate it. By various statutes passed chiefly by Edw. 1 certain specific combinations were made criminal, and designated by the Ordinance 33 Edw. 1 as "conspiracies." But by the letter of, or by necessary implication from, the previous statutes relating to the same offenses, before conspirators could be punished for their crime, the crime itself must have been completed by the full carrying out of the objects of the combination; that is, the suit must have been maintained and lost by the conspirators, or the victim of the appeal or indictment must have been tried and acquitted *legitimo modo* of the false charge. Then, and not until then, under the statutes, were the conspirators liable criminally. Now this did not adequately meet the evil, and so the Judges of Edw. 3 carved out of those statutes a lesser offense, namely, a "confederacy;" and they punished the combination, if it were discovered in time, before it had fully ripened into the conspiracy. But these punishable "confederacies" were only the combinations denounced by 33 Edw. 1; those and none others. (Adding of course the wool merchants' conspiracy, 27 E. 3, s. 2, c. 25.)

The text writers before Coke's time give no hint of conspiracies outside of the statutes.

Staundford, who was a Common Pleas Judge in Elizabeth's reign, published or wrote his Pleas of the Crown in the latter half of the 16th Century.

He gives quite a disquisition on Conspiracy, mostly taken up with the civil writ. He has not the faintest notion that there is any common law offense outside of

the Edwardian Statutes; but asserts the writ lay at common law as well on an acquittal on an *appeal,* as on acquittal on an *indictment;* and this notwithstanding West. 2, c. 12. This is a very different thing from saying that conspiracy is a common law crime; for as soon as the Statute makes a combination to do an act a crime, then one who is injured subsequently by that combination would, probably, at common law, have his civil remedy, on the principle of *"ubi jus, ibi remedium."* At any rate Staundford sticks to the Statutory offense.

The earliest text book mentioning conspiracy in its expanded sense is Termes de la Ley, which contains, in the editions subsequent to the Poulterers' case, a condensed statement of that case and Coke's glosses thereon; but the edition of 1579 contains only a copy of 33 Edw. 1, some references to statutes on Conspiracy of Edw. 3. Hen. 5, 6 and 7, and a short account of the villainous judgment. In the edition of 1629, the matter of the Poulterers' case is indicated as new since the previous edition.

Rolle's Abridgment refers only to 33 Edw. 1 and to the case of 27 Ass. 34. Fitzhebert, a Judge of Common Pleas, is to the same effect in his *Natura Brevium* written in 1519.

In all save one of the precedents contained in the *Register Brevium* the allegations relate to agreements to cause the plaintiffs to be arrested or indicted on some false criminal charge; the exception being a conspiracy to assert title in a dwelling belonging to M., by which M. had been brought before the court and despoiled and impoverished by the litigation; a case of maintenance, within 33 Edw. 1. This last precedent concludes in stating the conspiracy, as do the others in which the

formal conclusion is given, to have been *"against the form of the Statute"* or King's Ordinance. Reg. Brev. "De Conspiratione," p. 134, Ed. of 1687. This strikes us as practically decisive of the question.

Thus we find in the four centuries from 1200 to 1611 an unbroken, uncontradicted line of authorities; of forms of writs; of opinions of text writers (save only the "Fables of the Mirror") agreeing on the proposition that 33 Edw. 1 was indeed the "final definition of Conspirators" and that beyond its content conspiracy did not exist.

Blackstone did not have the slightest notion of endorsing the modern interpretation of Hawkins' text, *infra*. In Bk. 4, p. 136, he defines conspiracy as an agreement to indict an innocent falsely of a felony, who is accordingly indicted and acquitted. This goes away back to Edw. 1 and to the Book of Assises of Edw. 3. No mention is made of Hawkins, though the latter wrote sixty years before Blackstone. Neither does Judge Blackstone indulge in any theories about common law conspiracies; but then, as we all know, Blackstone was totally lacking in imagination and he actually tried to talk about the law as it really existed, not as doctrinaires thought it ought to be.

Hawkins published his Pleas of the Crown in 1717 and in Vol. 1, Ch. 72, he states that "there can be no doubt but "(sic) that all confederacies whatsoever wrongfully to "prejudice a third person are highly criminal at common "law"; a radical departure indeed from settled doctrine, if we are to consider "confederacies" as equivalent to "conspiracies"; but intelligible and proper if Hawkins was keeping in mind the distinction made by the early

judges between the two crimes. If he meant the former then he is absolutely unsupported by a single case cited by him. He cites 27 Ass., 34, 44; Grey of Groby's case; Poulterers' case; the Bastardy cases (Timberly and the others); Starling's case; Best's case; and *Saville* v. *Roberts*, all of which are herein elsewhere stated, save *Saville* v. *Roberts*, reported in Holt, 150; 1 Ld. Raym. 374; 5 Mod., 394, 405; 1 Salk., 13; and Carth., 416 (1699). This was case in the nature of a writ of conspiracy for falsely conspiring to indict Roberts for a riot, whereof he was acquitted. Plaintiff recovered damages below, and judgment was affirmed in King's Bench. Lord Ch. J. Holt drew the distinction between *case* in the nature of conspiracy and the ancient writ of conspiracy, saying the latter would lie only where the conspiracy had been to indict of a treason or felony. Hawkins' later editors add the cases of Cope, Tailors of Cambridge and Edwards.

If, however, Hawkins had in his mind the old distinction between "confederacy" and "conspiracy," his statement of the law is well enough; for by it he could have meant only to say that all "confederacies" wrongfully to indict or cause to indict, falsely to maintain pleas, &c., as defined in 33 Edw. 1, are highly criminal at common law. These "confederacies" are truly "wrongfully to "prejudice a third person," but the "prejudice" is only that prejudice which is defined in the Edwardian Statutes. So Thorp understood it in 1354; so Coke in 1611; and so, we believe, did Hawkins in 1717. Either that, or Hawkins is open to the criticism of stating a proposition not only unsupported by his authorities, but in flat contradiction of them and baldly untrue. Modern enthusiasts on common law conspiracy may take either horn.

Having misunderstood the ancient distinction between confederacy and conspiracy, the advocates of the common law theory seek to strengthen their position by appealing to the great name and reputation of Lord Coke. Coke certainly has said, more than once, that champerty, maintenance and conspiracy were offenses at common law independent of Statute, and these statements have usually been deemed conclusive of the law; so that in this century a lawyer attacking them for the first time comes dangerously near the line of ridicule. He may quote Lord Campbell's statement as to Coke's ignorance of and contempt for science and literature; he may quote Sir James Fitzjames Stephen's characterization of Coke's disorderly mentality, his inability to analyze the commonest words, and his inaccuracy with respect to his authorities; and he may point out with Prof. Maitland (the greatest living authority on medieval English law) Coke's credulity with respect to alleged ancient law writers; and still the almost irresistable weight of that great name will crush the venturesome critic. 1 Campb. Lives C. J. 333: 2 Stephen Hist. Eng. Cr. Law, 205, 206; Introd. to Mirror, 7 Seld. Soc., p. 10.

This much only can we say: We have before us all the material accessible to him and very much more; we have the advantage of three centuries of evolution of the human mind, with all that that implies in the way of freedom from superstition, analytical habits of thought and an immensely broadened intellectual horizon. It rests with each man to think for himself.

But note: Coke nowhere states the offense in broader terms than 33 Edw. 1, as more fully shown below.

We have asserted that prior to Edw. 1 the legal con-

cept of a crime of combination, without any further act, existed in no other system of jurisprudence. It did not get into the English system, from the Roman Law through Azo to Bracton; nor did it arrive with William from Normandy; no student from Bologna, Paris, Pisa, Padua or Salamanca brought it back to England; nor did it come down from the Anglo-Saxons. Coke did not know it as a common law doctrine from the cases, for it is not in the books now extant and in print, containing many more precedents in the formative period of the common law than he had access to. This we submit is a strong argument against its common law origin.

If it was already a known offense at common law in Edward's reign why did that law giver legislate so much and so often on the subject? That was not an era of making acts of the legislature "while you wait." An ordinance was a thing of moment, a thing thought about; and yet on these topics this "English Justinian" caused to be enacted eight separate statutes; more than on any other subject in the whole range of his legislation. If all this (and much more as some will have it) existed in the breasts of his Justices, why trouble himself and the new-born parliament with the matter?

Coke cites the Mirror and the Mirror only, 2 Inst. 383-4, 562. As well might a lawyer nowadays cite the Comic Blackstone. It would certainly raise no presumption that his proposition is true; whatever else it might bring about. In the note on page 383 of 2 Inst. will be found the origin of Lord Coke's error as to the common law nature of conspiracy. He says that he has read that Henry I. mitigated the pre-existing severity of the common law as to conspiracy, and comments for half a page on the matter. He cites the Mirror, de Hom., c. 4. The

passage referred to will be found in the Sel. Soc. Ed. of that book at p. 136; and there the author of the Mirror tells of this law of Henry I. which Coke cites, but which no one else in modern times has ever seen. Now if there is one point on which the author of the Mirror is strong, it is history and ancient legislation. True, his historical statements and his alleged legislative acts were mostly never heard of by any other person, and do not exist in any printed book or known manuscript now extant; but what of that? Has he not the same right to compose histories as Geoffrey of Monmouth or Baron Munchausen? He tells how Alfred the Great hanged forty-four of his judges in one single year for their false judgments. He even gives the names of the judges and the name of each case in which the false judgment was rendered (p. 166). Some of these names are Scandinavian, and some Norman, but that is a mere detail. The book was written between 1285 and 1290, and we know of the great judicial scandal of 1289. Horn, the supposed author of the Mirror, seemed to be a crank on the subject of "unjust judges," and fills a large part of his treatise with denunciations of them. It appears also that the trial by jury was in full blast in Alfred's time. The Mirror says so, pp. 166 *et seq*. There is also some wonderful news about the laws of Leuthfred and Thurmod (pp. 107, 152), and jury trials in their time, whenever that might have been. Nobody else ever heard of those law givers; but that also is a detail, perhaps thrown in, as the playwright says "to "add verisimilitude to an otherwise bald and uninteresting "narrative."

The Mirror has in it a good deal of literal transcript from Bracton; and here, it is needless to say, its author speaks law. He also tells us some "common law." For

example: A landlord cannot distrain his tenant's movables for rent in arrear; leases for more than forty years are void; rent reserved, in excess of one-fourth the annual value of the land, is illegal. The Mirror, 7 Seld. Soc. 129, 75.

We have devoted some space to the Mirror, for as an authority, except when otherwise corroborated, it is worthless; and its author simply a romancer with a hobby. If my Lord Coke was deceived by a plain liar, then it is neither fair or lawyer-like to use his name to bolster up the fraud.

But although Coke insists on the common law origin of conspiracy, champerty and maintenance, he was as far from subscribing to the modern doctrine of "common law "conspiracy" as was William de Thorp. He says a conspiracy is an agreement falsely to appeal a man of a felony (3 Inst. 143) and he does not go one single step further. Neither do Rolle nor Fitzherbert nor Staundford. They leave that to later text writers and judges.

But if conspiracy was a crime independent of statute, here is a curious thing. In 13 Ed. 1 c. 12 we find a complaint that certain men procure straw men to indict, and then, if there is an acquittal the "abettors" go free. And so the King will have the abettors punished. And how? Not by the villainous judgment, but by "imprisonment "and restitution of damages." This is strange. If there were a common law of conspiracy, one would say there was no need of this statute; it would only have been necessary to appeal the first appellor and his abettor of a conspiracy, and on conviction hale them to prison, raze their houses, dig up their trees, deprive them of their free law and their children of their inheritance. 27 Ass.,

59; 47 Ass., 11, the "villianous judgment." That is a comprehensive enough punishment surely. And, moreover, why provide that the acquitted appellee should have his damages, if the writ of conspiracy already existed? The more rational view is that when the evil was invented, Edward met it with a statute; as it grew, so he strove the more to abate it. The Stat. 13 Edw. 1 being inadequate he passed the 20th; that still being faulty he enacted the 28th and then the 33rd.

And yet again, every student of English history knows how jealously the staples, especially wool, were guarded, how much they were legislated about, how valuable to Henry III. and Edward I. for purposes of revenue; yet we read nothing about conspiracies to engross the staples, nor to export them, nor to injure them until 27 E. 3 when the statute was passed punishing conspiracies and confederacies relating to them; and at once thereafter in the Articles of Inquest in 27 Ass. 44; we find the justices ordered to enquire concerning merchants who conspire to affect the price of wool. Yet had conspiracy been a common law offense would we not rather expect to find some mention of it, as touching the staple, before that time?

Coke says one proof of its common law origin is that no punishment was denounced by 33 E. 1, and yet we find cases in which the villianous judgment has been suffered, this being a common law punishment. 3 Inst. 143. But that was the ordinary judgment of attaint following every felony unless otherwise provided. It was so in Glanville's time one hundred years before the Ordinance of Conspirators. Glanv. bk. 7, ch. 17.

These arguments, it is true, are largely negative; but

what shall be said of the two express decisions that it is no conspiracy to agree to imprison a man till he shall pay a fine, nor to agree to forge a deed and put the same in evidence? The former implies an assault and battery and extortion of money; the other, while at that time forgery of a private seal or deed was a minor offense, necessarily implies the perversion of justice by indirect means. Y. B. 24 E. 3, 75; Y. B. 39 E. 3, 13a. While forgery of the King's seal was treason, yet common forgery is punished rather incidentally in course of civil actions by imprisonment. Bract. N. B. case 934. Actions for fraud by forgery seem to be founded on 1 Hen. 5, c. 3; see 2 Pollock & M. 540. It is not until 5 Eliz., c. 14 (1563) that the offense is made a felony.

Fairly considered these decisions mean that it was not a conspiracy at common law to combine to commit a crime, even though the agreement, in the language of Hawkins, may be "wrongfully to prejudice a third per-"son."

Lastly, the Statute of 33 Edward I. says concerning itself that it is the "final definition" of conspirators. The original version is *"Ista ordinatio et finalis deffinicio "consp. &c."*

The rule with respect to statutes declaratory of the common law is that if they are made in the "affirmative "without any negative, expressed or implied" they do "not take away the common law." 2 Inst. 200.

The modern notion with many is that outside of the Edwardian Statutes there is a great mass of common law conspiracy which may be drawn on as the tastes or prejudices of courts may suggest. But the statute expressly provides that its definition is "final," or in the original,

"*finalis.*" *Finalis* is a post-classical adjective, the primary meaning of which has reference to "boundaries"; only secondarily does it connote an ultimate point of time. See Papin, Dig., 10, 1, 11. Such too is the meaning of the English "final." Had Edward meant final in point of time, he should properly have used "last" or "ultimate" which imply succession, while "final" respects the completion of the object. Crabb's Eng. Syn. tit. "last."

Can it be said that there is no "negative implied" in this expression? If it is "final," if its boundaries are fixed, if the object (the definition) is completed, how can it be said that there is anything left beyond and outside of the statute touching the same subject matter? Certainly, Coke, to whom these moderns appeal, never for a moment imagined a conspiracy outside of the Statutes. True, he speaks in Poulterer's case of conspiracies among wool merchants in support of his argument that the *confederacy* is punishable without any execution, but he was well aware of the statute of 27 E. 3, s. 2, c. 25, making it a crime for merchants to conspire concerning wool and the staples; for he sets it out and comments at large on it in 3 Inst. 95, 195.

He says: "Conspiracie is a consultation and agree-"ment between two or more to appeale or indict an inno-"cent falsely, &c."; and he sums up his understanding of the Poulterer's case thus: "*Nota*, reader, these *confeder-"acies*, punishable by law, before they are executed, ought "to have four incidents: 1. It ought to be declared by "some manner of *prosecution*, as in this case it was, either "by making of bonds or promises one to the other. 2. It "ought to be malicious, as for unjust revenge, &c. 3. It "ought to be *false* against an *innocent*. 4. It ought to "be out of *court* voluntarily" (italics ours). Certainly

all this does not get very far away from Edward's definition. Yet he is constantly appealed to as authority for the proposition that an agreement may be a criminal conspiracy, though neither end nor means be criminal.

We come now to celebrated Poulterer's case, decided in Star Chamber in 1611. 9 Rep., 55.

This is made to father all the modern judge made law of conspiracy, and hence it is worth while to state it fully.

One Stone had incurred the enmity of certain poulterers in London; and accordingly, for revenge, they conspired to indict him of a capital felony. They caused him to be arrested and bound over by a Justice of the Peace to the grand jury. Evidence was given by the conspirators before the grand jury, and that body returned the bill "ignoramus." Whereupon Stone sued out his writ of conspiracy in Star Chamber and the question was, did the writ lie where the party appealed had not been regularly acquitted (*legitimo modo acquietatus*, as the books say). It was held that the bill was maintainable. Coke, in commenting on this decision, cites Sydenham's case and admits that the action does not lie unless the party be indicted and *legitimo modo acquietatus;* then he refers to the criminal prosecution in 27 Ass. 34, 44; then to item 6 of 27 assises 44, directing inquiry of conspirators who agree falsely to indict *or* acquit (should be "and"); then to conspiracies among wool merchants; and then to the case in 19 R. 2, br. 926, in which the dictum occurs that the writ will lie though nothing be put in execution. This argument does not justify, on the authorities, the conclusion of Star Chamber in the main case; for, sifted down, there remains the express decision of King's

Bench in Sydenham's case that the writ does *not* lie till after acquittal, and opposed to it only the *dictum* of Wadham in the case 19 R. 2.

However, Coke was seeking to justify the usurpation of jurisdiction by his beloved Star Chamber. He began sitting there himself some fifteen years later, and was noted for his high-handed and oppressive acts, as a Star Chamber judge. (See 1 Campb. Lives C. J. 305.)

Thus far the cases and the statutes show the following:

1. That it was a criminal offense by various statutes to conspire: (a) to indict falsely; (b) to commit embracery; (c) to commit champerty; (d) to commit maintenance; (e) to disturb the price of the staples.

2. That, in its criminal aspect, "conspiracy," properly so-called, could not be punished until the object had been completed; as, e. g., until the appellee of a felony had been acquitted, *legitimo modo.*

3. That, in its criminal aspect, men might be punished for a "confederacy" which was the agreement preliminary to the *statutory* "conspiracy," though nothing had been put "in ure"; this latter being a common law offense, separate from the "conspiracy"; which was but the final overt act of confederacy.

4. No civil action lay by the appellee until after he had been acquitted *legitimo modo;* this upon the doctrine of Bracton; *"ubi factum nullum, ibi forcia nulla."*

5. That there is no syllable in extant books (except in the discredited Mirror) or manuscript of any other or different doctrine or of any other or different conspiracies, from 1066 to the Poulterers' case in Star Chamber, in 1611, overruling Sydenham's case (1574) in King's Bench.

6. That there is express authority that it was no crime to conspire to forge a deed of release and put the same in evidence. Nor was it conspiracy for two to combine to assault and imprison a man to force him to pay a fine or ransom. Y. B. 39 E. 3, 13a; Y. B. 24 E., 3, 75.

It is manifest, therefore, that the Star Chamber decision in Poulterers' case not only overruled Sydenham's case, but that it marks a new and dangerous departure from the previous law. The departure is in itself not great, even with Lord Coke's rather free comments; for he strictly limits conspiracies to statutory offenses; but it opened the doors of Star Chamber, and soon a crowd of litigants pressed through, with the result that the law of conspiracy began rapidly to enlarge.

Let us see how the historian of that tribunal viewed the work. In Hudson's treatise on the Court of Star Chamber (2 Collect. Jurid. 104, 105) we find the following language: "I will conclude the particular offenses which "I shall speak of with this great offense of *conspiracy* "rarely heard of in former times, but in our age grown "frequent and familiar. And herein some questions have "arisen; as in the case betwixt Rochester and Solm it "was questioned, whether if the party is *legitimo modo* "*acquietatus*, he may sue in this Court (Star Chamber) "for conspiracy? for Sir Edward Coke would have main- "tained, that after his acquittal he was to prefer his in- "dictment at the Common Law, where conspirators were "to have their villainies judged. But the Lord Egerton "did gravely confute that opinion, and open the jurisdic- "tion of this Court, manifesting that notwithstanding "the party might have his indictment, yet that excludeth "not the court of jurisdiction; for in all cases of force

"and fraud an indictment lieth at the common law; yet "this Court will proceed for the King also. * * * "But when the party is indicted, and not *legitimo modo* "*acquietatus,* then can no conspiracy lie, as it was ad- "judged in Daniel Wright's case. And therefor in the "case of *Baker* v. *Hall* and Alderman Lumley and others "for prosecuting an indictment against him upon the "Stat. 3 H. 7 for taking a woman against her will and "marrying her, which indictment he avoided by error, "and upon hearing it was adjudged that he could not "prosecute a conspiracy. Otherwise it is if the party be "never indicted, and that either the malice of the adver- "sary cannot prevail to have the indictment found, as it "was in the Poulterers' case, or the plot be discovered "before it came so far, as it was in the case of Sir An- "thony Ashley. In both these cases conspiracy will lie "in this Court; and *yet no action or indictment will lie "at the common law, unless the party be indicted, yea, "and acquitted also."* (Ital. ours.) "Thus then out of "these judgments it appears, that this Court hath juris- "diction in all cases of conspiracy where the common law "hath any, and *in divers cases further than the common "law."* (Ital. ours.)

In a note to this treatise it is stated over the hand of Finch (Ch. J. of C. P. 11 Car 1) that Hudson was "one "very much practised, and of great experience in the "Star Chamber and my affectionate friend." The book was written about 1625.

Here, then, is one fruitful source of error which had tended to mislead our courts. Think of American judges following Star Chamber precedents; "Star Chamber methods" having been the synonym of all that is abhor-

rent to free institutions since the settlement at Jamestown; a court which expressly held it was not bound by common law. Hallam says of its judges that they "sat, "like famished birds of prey, with keen eyes and bended "talons, eager to supply for a moment, by some wretch's "ruin, the craving emptiness of the exchequer." 1 Hall. Const. Hist. 443.

The greater the truth, the greater the libel is good Star Chamber doctrine; why not follow that worthy old principle to replenish the exchequer. (Hudson l. c. 102.) Why not fine a few jurors £3,000 each, as was done by Star Chamber in Throckmorton's case. (Hudson l. c. p. 72.) Or punish (by fines, of course, with lopping off ears as incidents) for breaches of *proclamation?* (Hudson, l. c. 107; Hall, l. c. 441.)

Another source of fruitful error of American courts, has been the rulings of the Court of the Exchequer, which by 38 H., 8, c. 39, had jurisdiction to punish, at discretion, all trespasses, deceits, negligences, defaults, contempts, offenses and other things in which the king should be the only complainant; and that King, Henry VIII.

Finally, when Star Chamber was abolished in 1641, King's Bench took over an undefined portion of its jurisdiction. Lord Mansfield said so, and added, *Jones* v. *Randall,* Lofft, 383, that King's Bench was "the general "censor and guardian of the public manners." We know of no court in this country which has dared to assume such powers.

Yet we find the decisions of all three of these courts cited in this country indiscriminately, for the more part, long after 1607 when they, in any event, can be persuasive only, and often with reckless disregard of the fact that

the English decision is predicated on some express statute which, after the manner of English judges prior to 1800, is not cited in the opinion. All that seems to be necessary is to find a case in point on the facts and then blindly follow it. Take *Le Roy* v. *Starling*, 1 Sid. 174 (1665), for instance. Some brewers cut the price of beer and were fined 300 marks each for doing it; fined for competition (think of it), because the Court feared Charles II. would lose his revenue. That is the blunt English of that case. Yet you will find it cited and approved by court after court in this country, with endless twaddle about the "public mischief" and the like. There was no public mischief about it. A profligate king was squandering his revenues on his vices and a subservient court sought to keep him in funds without the aid of a Parliament.

And the foregoing completes the survey of the English law on our topic up to and shortly after the fourth year of James I.; the year of the first settlement in Virginia, 1607; the year at which most of our states put the statutory limit of their adoption of the common law. Subsequent to that date English precedents are persuasive merely; they are "no more than the opinions of respectable lawyers, on the other side of the Atlantic." *Cathcart* v. *Robinson*, 5 Pet. 264; *Comm.* v. *York*, 9 Mete. 93; Sen. Spencer in *Lambert* v. *People*, 9 Cow. 578, 590; *Bowie* v. *Duval*, 1 Gill. & J. 175; *Stump* v. *Napier*, 2 Yerg. 45.

A cursory examination of those latter authorities, however, will conduce to the better understanding of our own cases.

In Timberly and Childe (or Kimberty), 1663, re-

ported in 1 Sid. 68; 1 Lev. 62; 1 Keb. 203, 254, the conspiracy was to charge one with being the father of a bastard child. On motion to quash the indictment on the ground that the charge was cognizable only by the spiritual courts, and hence a common law court had no jurisdiction of a conspiracy to prefer such a charge; Twisden J. said the charge was inquirable by the Justices of the Peace. The motion was overruled, and so later was the motion in arrest.

In a similar case in 1674 the same court stayed the judgment on the information, after conviction. *Green* v. *Turnor*, 3 Keb. 399. This because the conspiracy was to extort money and not to charge with an offense.

In 1691, the Court, while Holt was Chief Justice, held it to be a criminal conspiracy to agree to charge one with being the father of a bastard, though such charge was cognizable only in the spiritual court, and though no charge was actually made in such court. *Queen* v. *Best*, Holt. 151; 1 Salk. 174, 2 Ld. Raym. 1167.

These cases are within the letter of the Edwardian Statutes, for the agreement is to prosecute before some court, though it may not have been a court of common law; also they tend to pervert justice, and are hence obnoxious to the numerous maintenance statutes.

An extension of this doctrine, which, though not strictly within the letter, is yet within the mischief, of the old statutes is found in that class of cases punishing all combinations tending to pervert justice by indirect means: as for example, to influence the Court by false affidavits respecting repairs of roads; to procure the marriage of a chancery ward; to steal a chancery ward; to buy off witnesses; to impersonate a man and marry in

his name, in order, afterwards, to raise a specious title to his property.

Rex v. *Mawbey et al.*, 6 T. R., 619 (1796).
Rex v. *Locker et al.*, 5 Esp., 107 (1804).
Wade v. *Broughton*, 3 Ves. & B., 172 (1814).
Reg. v. *Hamp. et al.*, 6. Cox, C. C., 167 (1852).
Rex v. *Robinson*, 1 Leach, 37 (1744).

A clear departure from ancient doctrine was established by that line of cases holding the combination to commit any crime to be punishable; as, e. g., to obtain money for procuring a public office; to poison horses; to poison; to forge; to steal; to induce an apprentice to injure his master's goods.

Reg. v. *Pollman et al.*, 2 Campb., 229 (1809).
Rex v. *King et al.*, 2 Chitty R., 217 (1820).
Maudesley's Case, 1 Lew., C. C., 51 (1830).
Reg. v. *Brittain et al.*, 3 Cox, 76 (1848).
Reg. v. *Taylor*, 25 L. T. (N. S.), 75 (1871).
Rex v. *Cope*, 1 Stra., 144 (1719).

A departure more radical still is to be noted in those cases declaring criminal all combinations to commit acts violative of public decency or public morals. These proceeded on the theory that the Court of King's Bench was *custos morum*.

Rex v. *Delaval et al.*, 3 Burr., 1434 (1763).
Reg. v. *Haslam et al.*, 1 Denison, 73 (1851).
Reg. v. *Howell et al.*, 4 F. & F., 160 (1864).
Nisi Prims.

Which is not a common law principle, but a clear arro-

gation of jurisdiction by King's Bench, on the authority of Lord Mansfield.

An early case (1674) started the courts off on another tangent, and became the standing precedent for perhaps the largest class of so-called criminal conspiracies of modern times. We mean Thode's case. (Reported 1 Vent., 234; 3 Keble, 111.)

As the case is reported in Ventris, it is stated to be an information for a conspiracy to entice J. S. to play and to cheat him with false dice; and this was done, whereby he lost £70. Thode came in, pleaded, and was found guilty; the others came not. Motion in arrest was overruled, and "Wylde said the difference was where the 'vil-"lianous judgment' was to be given; and where the "conspiracy was laid only by way of aggravation, as in "this case."

The distinction is very well, if it were meant thereby that Thode and his pals were indicted for a *cheat* accomplished by cogged dice (which was an indictable offense at common law) and the allegation of conspiracy was added merely to aggravate the charge, the substance of which still remained the cheat; in which event it is not a conspiracy case at all. And this is certainly the ruling of the Court. The indictment is not preserved, and so the point must remain to be determined by the language of the opinions. As reported in Keble the case is certainly that of a cheat and not a conspiracy. We transcribe the report in full.

"*Dominus Rex* v. *Thode and Brothers Bennet & Ton-"son*, 3 Keble, 111 (24 Car. 2, B. R.). Information "for enticing Wingfield to play with Thode and deceptive "putting false dice on him and won 70 l. in gold, Bennet

"is found not guilty, the rest have not yet pleaded, and "only Thode found guilty, and Saunders excepted in an "arrest of judgment, that being all by way of conspiracy "one alone cannot be guilty, but *per curiam* on an action "upon the case for deceit, *conspiratione inde Habita* one "may be convicted alone, but when its action upon the case "*quod conspiraverunt,* one alone cannot be convicted; but "here being no pleading by the rest, nor no default by "the plaintiff, judgment may be given against one. So "where it is that they did conspire to get the party found "guilty to play with W. and that he deceptive cheated at "play, its well enough, which the Court agreed on, F. N. "B. Tit. conspiracione, but the parties agreed to try it "as (to) the brother."

This is a case of a cheat at common law, with false tokens, to-wit: the cogged dice, and the conspiracy is only by way of aggravation (a very common pleading in the 17th Century); and so it is not a precedent for conspiracy at all, though very often cited as such.

But whether the Thode case was a true conspiracy or not, it has been largely accepted as having established the doctrine that combinations to cheat, where the means are neither false tokens nor false weights nor false measures, are criminal conspiracies, and punishable, though the cheat never be effected and though such a cheat consummated by an individual is not an offense. *Rex* v. *Wheatley*, 2 Burr., 1125. Some of these conspiracies are, *Rex* v. *Brisac*, 4 East, 164 (1803); *Rex* v. *Gill*, 2 B. & Ald., 204 (1818); *Rex* v. *Hamilton*, 7 C. and P. 448 (1836). This doctrine is generally repudiated in the United States. See *infra*.

Some American courts have cited the case of the Jour-

neymen Tailors of Cambridge, 8 Mod. 10 (1721), as an authority that a combination to do an unlawful act is criminal, though the act, if done by an individual, is not punishable. There were statutes making it criminal for tailors and certain other artisans to combine to raise wages. (2 and 3 Edw. 6, c. 15; 5 Eliz., c. 4.) In this case, however, the indictment did not conclude against the form of the statute; but when that point was raised the Court said the gist was the conspiracy, and so the crime was an offense at common law; which is sound under 27 Ass. 34, 44. The Court then proceeds to say: "A conspiracy of "any kind is illegal, tho' the matter about which they con- "spired might have been lawful for them or any of them "to do, if they had not conspired to do it;" citing Tub-women's case. This last mischievous declaration was *obiter* merely, and is absolutely unsupported in authority, but it has done its evil work in corrupting the law. We say that it was proper for the indictment to conclude against the peace, etc., for that the conspiracy, i. e., confederacy, was a common law offense. A moment's consideration will show that this in no manner contradicts our argument against common law conspiracies. Edward I. defined certain acts as conspiracies. Now, the judges said in 27 Ass. 34, 44, that though "nothing be put in "ure," yet was a crime complete on the agreement. That is, where two agreed to maintain each other's quarrels true or false (a thing within the statute), though they did nothing more, that was a crime; or as we now express it, the crime was complete on the meeting of the minds. This is common law doctrine. Now in the Tailors' case the statute denounced combinations to raise wages, and at once the common law doctrine attached, and the combination to raise wages became indictable as a confederacy.

though "nothing be put in ure." This is a very different thing from saying that it was a crime at common law to combine to raise wages, for it was no such thing. It may be well doubted if the Court ever made the obiter remark in the report. Sir William Burrows said of that series of reports (Modern) it was a "miserable bad book;" and again when 8 Mod. was cited: "The Court treated that "book with the contempt it deserved, and they all agreed "that the case was wrong stated." *Rex* v. *Williams,* 1 Burr. 386; *Rex* v. *Harrison,* 3 Burr. 1322, 1326.

A case of doubtful authority was decided by King's Bench in 1783, in which several were indicted for a combination to "impoverish" the prosecutor (probably a master tailor) "by indirect means," the means not being further set out. In holding the indictment sufficient, Lord Mansfield said for the Court that while an individual might sell his goods for what price he pleased, yet several might not combine to hold up prices. *Rex* v. *Eccles,* 1 Leach 274.

In *Rex* v. *Turner,* 13 East 228, Lord Ellenborough, commenting on the Eccles case, said it was determined on the ground of restraint of trade; but Lord Mansfield's language would rather indicate that it involved a disturbance of the market. If it was decided on the ground of "impoverishing" an individual it is opposed to Starling's case. To combine to disturb prices, however, was an ancient statutory offense. (See 3 Inst. 196, 95; 27 E. 3 s. 2c. 25.)

A unique case (but one now often cited) is *Le Roy* v. *Starling.* 1 Sid. 174 (1665), sometimes called the Tub-women's case, in which certain brewers were indicted, because they conspired to "depress the gallon trade;" where-

by they would impoverish the farmers of the King's excise; whereby they would be unable to pay that chosen vessel of the Lord, Charles II., his revenues, which he so greatly needed for affairs of state and other *affaires*. The case was several times argued before the King's Bench, and it was urged that it was no offense "to depau- "perate others with intent to enrich one's self, as to sell "commodities at a cheaper rate" (i. e., competition). But the verdict of guilty was sustained and defendants fined, on the theory that to "depauperate" the farmers would render them unable to pay the King. Subsequent English judges have usually become explanatory over the case. See remarks of Holt, C. J., in Daniel's case, 1 Salk. 380; 6 Mod. 99. The Bench at that time was not at all apt to decide in favor of the subject against the King. Kelynge, an ignorant buffoon, was a member. He was later impeached and got off only by an abject apology. He is chiefly remembered now for his obscene rhyme perpetrated from the bench: "Magna charta, magna farta." A judge guilty of such an indecent remark concerning the Charter of Liberties of his country could hardly be expected to protect the rights of the people against the prerogative.

And finally we come to the proposition that a criminal conspiracy is an agreement to do an unlawful act, or a lawful act by *unlawful* means. Comparing that with 33, Edw. 1, we submit it is pardonable in the practicing lawyer to indulge in some Benthamistic remarks on "Judge- "made law." In *King* v. *Parnell*, 14 Cox. 508, P. and others were indicted for a conspiracy to impoverish landlords by persuading tenants to withhold their rent. Lord Fitzgerald, in summing up to the jury, quoted the above antithesis, and said it was "plain and clear" that an agree-

ment to commit any wrongful act was indictable. "If," said his lordship, "a tenant withholds his rent, that is a "violation of the right of the landlord to receive it; but "it would not be a criminal act, * * * but if two or "more incite him to that act, their agreement so to incite "him is * * * an offense. * * * It is a crim- "inal offense where two or more agree to do an injury to "a third party, * * * though that injury if done by "one alone of his own motion, would not be in him a "crime or an offense."

(b) *The Common Law of North Carolina as to Conspiracy.*

To establish his theory of a common law offense of conspiracy, Judge Clark in the case at bar cites and relies largely upon *State* v. *Buchanan*, 5 Har. and J. 317. This is commonly called the leading American case on criminal conspiracy. The opinion written by Judge Buchanan contains a cloud of precedents, and impresses the casual reader with the conviction that it is a learned and perhaps an unanswerable disquisition on the topic in hand. A careful investigation of the authorities cited discloses a startling, nay, a shocking, condition to the lawyer accustomed to pay proper deference to the courts of the land. Without attempting to characterize that decision, we will review the precedents invoked by the writer of the opinion and let them be the commentary.

The case was a prosecution of certain officials of the Bank of the United States at Baltimore for a conspiracy to defraud the bank. There was a demurrer to the indictment, which was sustained below and the State appealed. On reversal the case fizzled out on the trial on the merits. There were eminent counsel on both sides.

Luther Martin drew the indictment; and Wirt (among others) appeared for the State; while defendants were represented by Pinckney, Winder and Raymond.

After a review of the authorities, Judge Buchanan sums up the law as follows: "That every conspiracy "to do an unlawful act, or to do a lawful act for an illegal, "fraudulent, malicious or corrupt purpose, or for a pur- "pose which has a tendency to prejudice the public in gen- "eral is at common law an indictable offense, though noth- "ing is done in execution of it, etc."

Let us see how this startling conclusion is worked out.

Judge Buchanan affects to believe that the statute of 33 Edw. 1, the "Ordinance of Conspirators," is merely declaratory of *a part* of the common law, which existed when it was passed; and that outside of its terms a great body of conspiracies existed which could be drawn upon to suit the predilections of the Court. His first point is that the act is a mere definition and prescribes no punishment. The answer to that is that in statute after statute in the preceding thirty years the various offenses named in the ordinance had had penalties affixed to them: and besides, for every felony the law prescribed the "villainous "judgment." Next he quotes 3 Inst. 143, in which Coke says the statute is merely declaratory, the reason adduced being that conspirators could be punished by the villainous judgment, which was a common law punishment. The answer to this is that that penalty was the ordinary judgment in every attaint. Next he says, "who doubts * * * "that a conspiracy to commit any felony is an indictable "offense." To which it may be answered that there never was in England a single conviction for any conspiracy outside of the statutory conspiracies from 1066 to 1665.

the Tubwomen's case, a period of six centuries, though there were numerous cases within the statute during that time. William de Thorp, one of the greatest of the Judges of Edward III., doubted it, nay, more, *denied* it. In Y. B. 39, E. 3, 13 a. (1365), one sought a writ of conspiracy against several because they had combined to forge a deed of release and put it in evidence in a former suit, whereby the petitioner had lost his case; and Thorp said: "Do "you ask a writ of conspiracy on the ground of an evi- "dence? You shall not (have it)." Coke doubted it, for in 3 Inst. 143, he defines a conspiracy to be an agreement falsely and maliciously to indict an innocent of a felony, and he does not go one step beyond that. Blackstone doubted it for he defines the crime just as Coke defines it. 4 Com. 136.

Next he says that the statute is not prohibitory, and hence the common law still stands.

Observe that Judge Buchanan quotes the ordinance in full, save the last line, "this ordinance and *final* definition, "etc." The original is, "*Ista ordinatio et finalis deffinicio.*"

Finalis as we have stated above, refers to "boundaries" and only secondarily to a period of time. In other words, Edward meant to put the limits to conspiracies. Here clearly is Coke's "implied negative." We repeat, Coke thought that 33 E. 1 defined *all* the then conspiracies, as fully appears from his Institutes and from his gloss on the Poulterers' case.

Then the learned judge cites the instance of the Wool Merchants' conspiracy, referred to by Coke; and says that this was a *common law offense*, for it is not covered by 27 E. 3, c. 9, prohibiting exportation of wool. Did

the learned Judge examine that statute? He refers to cap. 9; did he fail to see cap. 25 of the same act? That paragraph in express terms refers to "conspiracy, con-"federacy, etc., for the impeachment, disturbance, defeat-"ing or decay of the Staples."

On page 338 the case of *Brereton et al., Noy.* 108 (proper citation Noy, 1st Ed. 103), is cited and the Maryland Court say: "This was a case of fraud effected by "a confederacy, and the injury was to an individual; the "suppression of a will by one was not an indictable offense. "* * * It was the confederacy alone which rendered "it criminal, and therefore the information was against "the offenders conjointly."

It would be difficult to compress in the same number of words more misstatements concerning this case. It was *not* a case of fraud *effected* by a *confederacy*. All the parties were principals in suppressing the will, and the report so states. Neither the word confederacy, nor its equivalent, nor any synonymous nor cognate notion is expressed or implied in the case. It is no more an authority for a conspiracy case than if four had simultaneously assaulted and killed one, and all had been indicted for murder. True, the "injury was to an individual," just as if A had assaulted B and robbed him, and in no other sense. The suppression of the will by an individual *was* an offense cognizable by that Court, by 3 Hen. 7, c. 1, and by 4 Edw. 3, c. 11. It was *not* the confederacy *alone* which rendered it criminal, no more than in the instance of murder, above cited. The case is just as good an authority for novel disseisin or mort d'ancestor as it is for conspiracy; no better, no worse.

On pp. 339, 340, the so-called bastardy cases are cited,

first of which is *Childe* v. *North* (1663); 1 Keb. 303; s. c. 1 Sid. 68; *King* v. *Armstrong*, 1 Vent. 304; *Queen* v. *Best*, 2 Ld. Rayd. 1167; Holt 151.

These cases were conspiracies or rather "confederacies" falsely to "charge" one with being the father of a bastard child, with intent to extort money, etc. Judge Buchanan insists that the word "charge" was not used in its technical sense, but only meant that the conspirators intended to extort money from the "individual by going to him "and affirming that he was the father, etc., with a view to "inducing him to pay them to say no more about it."

This is a plain misstatement of the cases. The contention by defendants was that the contemplated charge was cognizable only by the spiritual courts and hence the common law had no jurisdiction to punish an agreement to make such a charge. This was answered by Twisden, J., in Childe's case, as reported in 1 Sid. 68, that the charge was cognizable by the Justices of the Peace. The opinion of Holt, C. J., in the Best case, too long to quote here, clearly shows the conspiracy was to make a false accusation, in a spiritual court, of bastardy, though the conspiracy did not reach the stage of actually preferring the accusation; and *"per curiam:* This is a conspiracy to "charge one falsely with fornication, which though it (i. "e., fornication) be no crime at common law, yet is pun- "ishable in the spiritual courts; and a confederacy to "charge with a thing that is a crime by any law is indict- "able." Holt, 151. In the report in 2 Ld. Raym. 1167, the indictment is that they conspired, etc., *"ad onerandum "et accusandum,"* which, of course, are terms of art, and mean to procure an indictment or an information before some judicial body. Moreover, it was stated, on p. 1169

of Ld. Raym. report, that two justices had adjudged the prosecuting witnesses (in the conspiracy case) to be the father, etc., on which Holt, C. J., remarked: "If the "defendants had pleaded that conviction it would have "been a good bar to the indictment" (for the conspiracy).

If the learned Maryland Judge had read Keble a little more closely, he would have found another bastardy case, but one fatal to his contention. In *Green* v. *Turnor*, 3 Keb. 399, the information was for a conspiracy to "draw "sums of money from the plaintiff, not for getting the "bastard." There was a difference of opinion at first among the judges of King's Bench; Twisden, J., insisting that the information did not lie. After conviction, however, judgment was stayed. This case is precisely what Judge Buchanan insists the Childe and Timberly case in 1 Keble to be; but in the latter the same Court held the combination to be indictable, while in the Turnor case defendants were discharged. This shows conclusively that the Childe case was to charge, that is, to cause to be indicted or complained against in some court, the putative father, with the ulterior motive of blackmail; while the Turnor case was just what it says it was, namely a conspiracy to blackmail and not to "charge" with bastardy, and the latter agreement was held not indictable. If further confirmation of this view be needed, it can be found in the remarks of Lord Denman, C. J., in *Rex* v. *Seward*, 1 A. and E. 706 (1834).

On page 340 the Court cite *King* v. *Bryan*, 2 Stra. 866 (1730), for the *obiter dictum* of the English Court referring to *King* v. *Armstrong*, saying, "there the conspiracy "was the crime; and an indictment will lie for that though "it be to do a lawful act." The Bryan case was not a

conspiracy case at all, and the *dictum* was not only wholly unnecessary, but, as stated, was not the law.

On p. 344 Judge Buchanan cites the Markarty case, and while admitting that the defendants were not charged "with a conspiracy *eo nomine*, it was the combination "alone on which the prosecution would have been sus- "tained." Similar remarks are made on the Wheatley and Orbell cases. *Rex* v. *Markarty et al.*, 2 East, C. L. 823; *Rex* v. *Wheatley*, 2 Burr. 1125; *Rex* v. *Orbell*, 6 Mod. 42. Markarty's case was a cheat, *effected* by a conspiracy, a totally different offense from a conspiracy to cheat. At common law it was indictable for one to cheat another by the use of false weights, measures or tokens; so, too, it was a crime for *several* to cheat one by means of a conspiracy. It was not a crime for *one* to cheat another by false representations; but if two combined in the false representations and *thereby* effected the cheat, that was indictable as a *cheat* accomplished by means of a conspiracy. To illustrate: A sells a horse to X, falsely representing it to be sound and kind. This is no indictable cheat, because there are used no false weights, nor false tokens, nor any *conspiracy*. But A and B agree to falsely represent the horse to be sound and kind, and X, believing the combined statements, buys the horse. Here is an indictable offense—not an indictable conspiracy—but an indictable cheat; indictable because *effected* by a conspiracy. Judge Buchanan has utterly failed to grasp this distinction, though set out in most perspicuous language by Lord Mansfield in the Wheatley case; a case cited by the Maryland Court.

At p. 345 Judge Buchanan cites Edwards' case, *Rex* v. *Edwards*, 2 Stra. 707; 8 Mod. 320, *and states the deci-*

sion just exactly the opposite of what it really is. The case was a conspiracy to procure two paupers to marry, and then settle both on one parish. The Maryland Judge says that this was "held by the Court to be an indictable "offense at common law; for that a bare conspiracy to do "a lawful act to an unlawful end was a crime."

On the demurrer to the indictment in this case Lord Raymond gave judgment for the defendants, *"Because "not an offense indictable."* See the report in 2 Stra. 707.

On p. 345, Cope's case, the conspiracy was to hurt a card-maker's trade by procuring his apprentice to put grease into the paste. Judge Buchanan says it was no crime to put grease in the paste, and that the case is an authority for the proposition that an agreement to do an *unlawful act* is a crime. The answer to this is that it *was* a crime by statute for an apprentice to wilfully injure his master's goods; and so the conspiracy was to commit a *crime. R.* v. *Daniell,* 6 Mod. 99; 5 Eliz., c. 4, sec. 35.

King v. *Eccles,* 1 Leach, C. L. 274, is considered by the Maryland Court (p. 346) to be a strong case in support of the argument of Judge Buchanan. The report is meagre, but it seems that the indictment was for conspiring to impoverish a tailor by "indirect means." Speaking of this case, and of the Cope case, *supra,* Judge Buchanan says they were conspiracies leveled at individuals, in which the public had no concern. In a note to the report of Eccles case attention is called to Lord Ellenborough's statement in *Rex* v. *Turner,* 13 East 228, that the Eccles case was considered a conspiracy in restraint of trade and so one affecting the public. Yet the Maryland Judge passes this over entirely. Certainly it could not have been deemed solely to depend on the object for its criminality,

for that was simply to "impoverish;" and not a conspiracy under the authority of *King* v. *Starling*, unless the "indi-"rect means" were criminal.

On p. 347, *King* v. *Robinson et al.*, 1 Leach C. L., 37. 1744, is cited. This was a case in which the indictment charged a conspiracy for Taylor to personate Holland, the employer of the Robinson woman, and marry her "that she might entitle herself to his (Holland's) estate." They did so intermarry, Taylor being disguised in Holland's clothes and wig and using Holland's name. Of this case the Maryland Judge says: "It has been in-"geniously argued here, but not ventured on by those "who conducted the defense of Robinson and Taylor, "that they meditated a perversion of the course of jus-"tice, as her right to Holland's estate could only have "been established by judicial proceedings. It was not "so charged in the indictment, &c." It does not appear how Judge Buchanan knew what the indictment charged, for the report sets out no more than we have quoted above. In the marginal syllabus in Leach the case is stated to be a conspiracy "for the purpose of raising a "specious title to the estate;" and a reference is made to 2 East., P. C. 1010, where the language is used that the purpose of the conspiracy was that of "afterwards "raising a specious title to the property of the master." The suggestion of the court that counsel for Robinson and Taylor did not make the "ingenious" point as to perversion of justice seems a little singular. Why should they help out counsel for the Crown in making a good case against their clients?

A conspiracy to raise a specious title to an estate was a statutory offense under the express language of 33

Edw. 1, for they "confeder * * * falsely to move "or maintain pleas." This statute is in full force in England to-day, as it has been since its enactment, and its provisions have been extended and enforced by numerous other Acts. 1 Edw. 3, s. 2, c. 14 (1326); 4 Edw. 3, c. 11 (1330); 20 Edw. 3, c. 4 (1346); 1 Ric. 2, c. 4, 1 Ric. 2, c. 7 (1377); 7 Ric. 2, c. 15 (1383); 3 Hen. 7, c. 1 (1487, which is the celebrated Act reviving Star Chamber); 32 Hen. 8, c. 9 (1540). These statutes are directed at conspiracies for the perversion of justice and are in the direction of continual expansion of the Acts of Edw. I.

On p. 347 Rispal's case is cited. 1 W. Bl. 368; 3 Burr. 1320. This is not a conspiracy case at all, but a cheat effected by a conspiracy, as expressly stated by Lord Mansfield in his opinion.

Macklin's case (1 C. & K. 28 n.; 2 Campb. 372 n. The indictment is set out in 6 Wentw. 443. See 6 M. & G. 217 n.), cited by the Maryland court, is not a conspiracy case, the charge having been riot and obstruction of the play, and the words of conspiracy in the first count are only matter of inducement. The Lara case, cited at p. 347 (*King* v. *Lara*, 6 T. R. 565, 1795), is a case against a single individual for a cheat.

The De Berenger case, cited at p. 348 (*King* v. *De Berenger*, 3 Maule & S. 67, 1814), was a conspiracy to raise the price of public funds by false rumors concerning the Napoleonic wars. The Maryland Judge says: "It was clearly on the point of individual injury that the "Court went." Lord Ellenborough, who *decided* the case, said (p. 72): "A public mischief is stated as the "object of this conspiracy. * * * It is a fraud lev-

"eled against all the public." How the Maryland Court can state that the case went off on the point of individual injury, in the face of the express declaration of Lord Ellenborough, is certainly not very clear. Moreover, conspiracies to disturb the market by false rumor was made a crime, centuries before the De Berenger case was decided, by 27 Edw. 3, st. 2, c. 25 (1353); 37 Edw. 3, c. 5 (1363); 6 Edw. 6, c. 15 (1552); 25 Hen. 8, c. 2 (1533); and so the case is no authority on the common law of conspiracy.

Moreover, all of the English statutes from the time of Edw. I. to the fifth year of Geo. II. relating to conspiracies were in full force and effect in North Carolina at the date of the decision of the Younger case, *infra*. See Xavier Martin's Collection of the Statutes, 1792.

As to the case of the Journeyman Tailors of Cambridge (8 Mod. 10), cited on p. 350, we have elsewhere commented thereon and shown that it in no wise supports the argument of the Buchanan case. The remark of the Maryland Court, that the indictment was not under 7 Geo. 1, st. 1, c. 13, is quite true, but for a reason that that learned judge did not in the least suspect, viz., that the statute in question applied only to tailors "with-"in the bills of mortality," *i. e.*, London, and not to Cambridge tailors; but nevertheless there were statutes covering the case of their agreements to raise wages, 2 & 3 Edw. 6, c. 15 (1548); 6 Edw. 6, c. 15 (1552), and 5 Eliz., c. 4 (1562); and as we have explained before, the statute having denounced the "conspiracy" to raise wages, under the decision of 27 Ass. 34, the "confederacy" to do so was a common law crime. This case is generally discredited. Stephen says it is of "doubtful" authority (3 Steph. Hist. Cr. L. 209). Lord Campbell

declined to follow it (*Hilton* v. *Eckersley*, 6 E. & B. 47, 62). In addition to the unreliability of Modern R. the case intrinsically is suspicious, for the reporter seems to make it turn on 7 Geo. 1, which, as we have said above, did not apply to Cambridge.

King v. *Delaval*, 3 Burr. 1434 (1763) is cited on p. 350. This was where a master conspired to assign the indentures of his female apprentice to defendant for purposes of prostitution. The Maryland Court say the end was not unlawful, but the conspiracy alone made the crime. It cannot be doubted that at that time the master could have been indicted for the offense, aside from the conspiracy, under the declaration of Lord Mansfield that King's Bench was *custos morum*. *King* v. *Sidley*, 1 Sid. 168 (1664); *Bagg's Case*, 11 Rep. 93, 100.

On p. 350 the Court cites Hawkins P. C. and professes to quote him as follows: "There can be no doubt that "all *combinations* whatsoever wrongfully to prejudice a "third person are highly criminal at common law." Hawkins does not use the word "combinations" but "confederacies," a word which had a very different meaning from combination in his day. We have examined his statement elsewhere in this argument and shown that as understood by the Maryland Court the doctrine is flatly contradicted by the very authorities cited by Hawkins.

The foregoing are practically all of the authorities relied on by the Court in the Buchanan case. Some of them are misquoted; some are misstated; in some there are suppressions; in some reckless statements are made as to the common law when the cases were founded on statutes; several are not conspiracy cases at all; in one at least (Edwards case) the judgment of the Court is

precisely the opposite of that given by the Maryland Court!

The Court is also capable of misstating a case which makes against its thesis; for example, *Rex* v. *Turner*, 13 East. 228, which was an agreement to go upon another's grounds, with arms, and there to snare hares. Lord Ellenborough, in holding this not an indictable offense, says that the agreement was "to go and *sport* upon another's ground," meaning of course (as the report says) to snare hares there; to poach; but Judge Buchanan seizes upon the phrase "to sport" and calls it entering another's close "for the purpose of *innocent amusement*," as though the defendants had been boys entering to play leap-frog!

So also is the Court capable of omitting entirely cases which are not decided to its liking; for while citing cases from the Year Books, he omits to cite the case of the forged release, held not to be a ground of conspiracy: Y. B. 39 Ed. 3, 13a.; he omits the agreement to imprison, held not a conspiracy; Y. B. 24 Ed. 3, p. 75: he persists in stating that it was a *common law conspiracy* for merchants by "conspiracy, confederacy, &c.," to disturb the staples and raise the price of wool, and cites in proof thereof the Articles of Inquest of 1354 directing the Assises to inquire into such conspiracies, 27 Ass. 44, item 19, when in truth that "item" follows exactly a new statute of Edw. 3 just passed. 27 Edw. 3. st. 2, c. 25. He misstates Lord Coke's doctrine of conspiracy in the Poulterers' case; and, perhaps worst of all, in his attempt to show that 33 Edw. 1 meant only to define a few of the then existing conspiracies (pp. 334 *et seq.*) he omits the last line, which calls the statute the "ordinance and *final definition* of conspirators."

The very essence of a judicial decision founded on precedent consists in a faithful and true presentation of the authorities relied on; that many of those authorities exist only in a language unintelligible to the majority of the bar emphasizes the need of truth. Speaking for the bar and the litigants represented by them, we affirm that our respect for the American bench is bottomed principally on a well founded belief in the moral and intellectual honesty of the incumbents. Take away that confidence and anarchy will impend. We venture the assertion that nine out of ten conspiracy cases in this country since 1825 have cited and followed the Buchanan case. On its authority hundreds of men have lost their liberty. We now appeal to this Court to set its seal of condemnation upon this partisan decision, this false precedent.

It is scarcely worth while to pursue this question of a common law conspiracy further. An examination of the American cases will disclose that they are, one and all, founded upon the English cases already reviewed; or upon Hawkins' statement; or upon some blind copyist of Hawkins, as Archbold, Chitty, Bishop or Wharton; or upon the Buchanan case. If we have succeeded in our endeavor to show the polluted source of this stream, what boots it to analyze the waters lower down?

Take two instances only, Massachusetts and New Jersey; both of them in the very first rank as expositors of the law.

In *Comm.* v. *Judd,* 2 Mass. 329 (1807), Ch. J. Parsons held that a combination to manufacture a spurious article of indigo and to put it on the market as the prime article was a common law criminal conspiracy. The learned judge defines the crime: "A conspiracy to do

"a lawful act for an unlawful purpose is an offense." He cites only three authorities: *Rex* v. *Edwards*, 2 Stra. 707; 8 Mod. 320; *Rex* v. *Robinson*, 1 Leach 47, and the *Journeymen Tailors' Case*, 8 Mod. 10. The first of these was the combination to settle two paupers on a certain parish by causing them to intermarry, which was held by Lord Raymond to be *no indictable offense;* the second was a crime by virtue of the English statutes 2 & 3 Edw. 6, c. 15, and 5 Eliz., c. 4; the third was a maintenance case within 33 Edw. 1. It is thus clearly to be seen that the decision finds absolutely no support in the authorities cited. It is but fair to say, however, that the Court had no assistance whatever from counsel for defendants. They seem to have rested their case on the futile proposition that a conspiracy to defraud the public generally was no offense; apparently conceding that the combination to sell the inferior article to individuals named would have been criminal.

In New Jersey the early statute of conspiracy restricted the crime to combinations to indict an innocent falsely of a felony. A case arose in 1827 in which the indictment charged a conspiracy to defraud a bank by drawing checks when the conspirators had no funds. *State* v. *Rickey*, 4 Halst. 293 (1827). The indictment was quashed by the Supreme Court; by Ford, J., because it was no conspiracy to agree to defraud the bank by the means proposed, holding that there was no conspiracy at common law; and by Drake, J., because the frame of the indictment was defective. The opinion of the first named judge is instructive. He quotes Coke and Blackstone on conspiracy, both restricting it to 33 Edw. 1; then he takes up Archbold's definition, which is a literal transcript of Hawkins, and reviews the for-

mer's authorities, showing how far short they fall of the definition.

But later the same Court takes up the same question, *State* v. *Norton*, 3 Zabs. 33 (1850), and chiefly on the authority of *State* v. *Buchanan and Hawkins*, repudiates the sound reasoning of Judge Ford, and insists on the undefined "common law" conspiracy.

In the opinion of the majority in the case at bar, we find, as above stated, *State* v. *Buchanan* put in the front rank.

Next is cited *State* v. *Burnham*, 15 N. H. 396. This case relies on the following authorities: Hawk. P. C., which we have already referred to and demonstrated that the text, as generally now understood, is wholly unsupported, nay even contradicted, by the precedents cited; Chitty, Russell and Archbold are merely servile copyists of Hawkins; *Comm.* v. *Judd*, 2 Mass. 329, which, as we have shown, relies on one case holding the combination *not* to be a conspiracy, and two others covered by English statutes; *Comm.* v. *Hunt*, 4 Metc. 111, which holds that a combination among workmen not to work for any employer who employed journeymen not members of the boot-makers' club was not a crime. Much is said in this last case by the learned Ch. J. Shaw about what acts are or are not indictable conspiracies; but the only point ruled was as stated, and that the indictment did not charge a crime; the rest was *obiter*. *Lambert* v. *People*, 9 Cowen 578, holds an indictment to cheat and defraud by wrongful and indirect means does not state a crime. The opinion of Senator Stebbins referred to by the New Hampshire Court is a minority opinion. *King* v. *Seward*, 1 Ad. & E. 706, holds a com-

bination to procure two paupers to intermarry to settle both on one parish is *not* an offense. *King* v. *Eccles*, 3 Doug. 337, we have heretofore discussed. *Fowler's Case*, 3 East. P. C. 461 (should be 1 East. P. C. 461), was the same as Seward's (*supra*) and was held *not* indictable. *Best's Case*, 2 Ld. Raym. 1167, was a conspiracy to prosecute one criminally within 33 Edw. 1. *Vertin* v. *Lord Clive*, 4 Burr. 2475, was a combination among nearly all the officers in command of Sepoys to resign in time of public danger. It was held under the *Indian Mutiny Act* that this was a crime. This is a case decided under military, not under common law. *Comm.* v. *Davis*, 9 Mass. 415, seems illy considered. It would appear to be a cheat effected by a conspiracy and not a conspiracy to cheat. The opinion is just one line and a half long. It does not seem ever to have been cited in Massachusetts in subsequent cases. *Gill's Case*, 2 B. & Ald. 204, was a case which held a charge of conspiracy to cheat and defraud by divers pretenses and subtle means was good. This case has been strongly criticised by the English bar and subsequent English cases. (See *Rex* v. *Richardson*, 1 M. & R. 402; *Rex* v. *Fowle*, 4 C. & P. 592; *Rex* v. *Bins*, 1 A. & E. 327; *Rex* v. *Peck*, 9 A. & E. 686.) The matter has been cured in England by making a bill of particulars demandable of right; a virtual overruling of the Gill case. *State* v. *Buchanan*, 5 Har. & J. 317, on which we have commented at length The *Tailors of Cambridge Case*, 8 Mod. 10, which, as we have shown, is founded on an English statute. *King* v. *De Berenger*, 3 M. & S. 67, also under a statute, as shown above.

Thus we see the New Hampshire case is without support in the authorities cited.

The case of *State* v. *Pulle*, 12 Minn. 164, next cited by Judge Clark, is even worse, for to the point of common law conspiracy only the single authority of the Judd case, *supra* is cited.

Judge Clark then refers to *Comm.* v. *Hunt, supra*, which only decided one point, and that against the alleged conspiracy. Then *U. S.* v. *McCord*, 72 Fed. R. 159, is cited. This went off on the sole point that limitations began to run from the instant the minds of the conspirators met.

Then, of course, *State* v. *Younger*, 12 N. Car. 357 (1827), is cited by Judge Clark. This was a combination by several to get one drunk and cheat him at cards. There was a motion to arrest the verdict of guilty. The Attorney General submitted the case in the Supreme Court without argument, and there was no appearance for defendants. Thus was the Court without assistance.

After stating the ancient law of conspiracies, the learned Ch. J. Taylor remarked that modern cases had greatly extended the older doctrine, so that "every con-"spiracy to injure individuals, or to do acts which are "unlawful, or prejudicial to the community, is a con-"spiracy and indictable; as where divers persons confed-"erate together by indirect means to impoverish another; "or falsely and maliciously to charge a man with being "the reputed father of a bastard child; or to maintain "one another in any matter, whether it is true or false. "(Hawk. 466, sec. 2.) Playing at cards for money is "in itself unlawful, and where two persons conspire to-"gether to make an unlawful act the means of doing an "injury to or impoverishing another, it is stronger than "many of the cases which have been held indictable.

"Even a bare conspiracy to do a lawful act to an un-"lawful end has been held indictable, though no act was "done in consequence thereof. (8 Mod. 321.)" The Court then cites the Wheatley case, the Mackarty case and *Comm.* v. *Ward,* 1 Mass. 473.

In the instances given by the learned Judge we discover some old friends. To impoverish another by indirect means is the Eccles case; to falsely charge one with being the father of a bastard is the Timberley and other bastardy cases; both of which we have examined at length, *supra.* To maintain one another, true or false, is directly covered by 33 Edw. 1, then in force by express enactment in North Carolina. 8 Mod. 321 is the Edwards case, held *not* indictable. *Comm.* v. *Ward,* 1 Mass. 473, was a combination to get goods on credit and abscond. There was no motion in arrest; but in a note the reporter naively says he supposed the motion was abandoned, because counsel's attention had been called to the Mackarty and Wheatley cases, both of which are old acquaintances, but neither a conspiracy case. The Ward case is referred to in *Comm.* v. *Eastman,* 1 Cush. 189, 224, as being *dictum* merely; and was there distinctly overruled, if a *dictum* can be said to be overruled. Thus examination shows the ruling in the Younger case to be based on no precedent whatever.

Next the majority opinion cites the Brady case (107 N. Car. 822). The opinion in this case cites the shop-worn English precedents on the frame of the indictment, and for the nature of the offense relies on the Younger case. Follows next the Powell case (121 N. Car. 635). No authority cited save Wharton's forms. Finally the Wilson case (121 N. Car. 650) is appealed to. This

last, so far as the offense of conspiracy is concerned, relies on the Younger case and 2 McClain Cr. Law, § 959.

Thus, so far as North Carolina has decided, conspiracies in that State rest principally on the Younger case; and this laborious analysis of the majority opinion in the case at bar shows, we submit, that the conclusion as to what is a criminal conspiracy and that there was such an offense at common law to be wholly without valid support.

The inconsistency of the North Carolina cases in their rulings as to common law crimes is well illustrated by the decision in *State* v. *Kessler*, 78 N. Car. 469, which holds that incest is not a common law crime; and since there was no such offense by statute, defendant was discharged. Yet the common law offense of incest rests upon precisely the same authority as the common law offense of conspiracy, namely the "Mirror," Seld. Soc. Ed., pp. 28, 29.

(c) *Common-law of conspiracy abolished by Statute in North Carolina.*

If there ever were any such thing as a common law of criminal conspiracy in the State of North Carolina, it has been abolished by statute.

The Statute of North Carolina provides, Rev. Code, § 641: "All such parts of the common law as were "heretofore in force and use within this State, or so "much of the common law as is not destructive of, or "repugnant to, or inconsistent with, the freedom and "independence of this State and the form of government "therein established, and which has not been otherwise "provided for in whole or in part, not abrogated, repealed

"or become obsolete, are hereby declared to be in full "force within this State." This Act has been in force in substance since 1715.

In addition thereto, long prior to the Declaration of Independence a great number of English statutes of a very early date were also in force. These included nearly all of the general acts of the English Parliament, not peculiar to local conditions, from Magna Charta to George II. (see Xavier Martin's collection, 1792) and embraced all of the conspiracy statutes which we have cited above.

Now in 1827 the case of *State* v. *Younger*, 12 N. Car. 357, was decided, by which a very broad definition of criminal conspiracy by the common law of the State was established.

Upon the face of the Statutes and the Younger case we have then: All the English statutory conspiracies: all the English common law conspiracies; and conspiracies covered by this last mentioned case.

This situation continued practically unchanged for forty years (except for the repeal in 1834 of all of the English Statutes above mentioned) until 1868, when an Act was passed making it a criminal offense to conspire to incite insurrection, etc., and denouncing a maximum penalty of ten years.

Our contention is that the passage of this act *ipso facto* repealed all of the so-called common law of conspiracy in North Carolina, whether established by the English cases or as interpreted by the Younger case: and this by force and virtue of the Statute above quoted adopting the common law.

The rule at common law is that "a statute made in

"the affirmance, without any negative expressed or im-"plied, doth not take away the common law." 2 Inst. 200.

It is manifest, however, that the Statute in question abrogates this rule and adopts exactly the reverse principle. Reduced to its lowest terms, touching the point here under discussion, it reads: "So much of the com-"mon-law * * * which has not been otherwise pro-"vided for, in whole or in part, * * * (is) hereby "declared to be in full force within this State."

Coke's illustration of the common-law rule is the case of trespass in parks or ponds under West. 1, c. 20; for which vindictive damages and imprisonment are given by the ordinance; whereas at the common law only actual damages could be had; but as the Statute contained no negative words, the common-law action still remained. 2 Inst. 199, 200. Under the North Carolina act, however, any common-law action of trespass theretofore existing would, on the enactment of a law covering such action, be *ipso facto* repealed, though the new law contained no negative, expressed or implied.

But the North Carolina Statute goes a step further and provides that, if any "part" or topic of the common law is legislated upon, without any saving clause, the whole part or topic is abrogated, leaving only the statutory enactment as the entire law on the subject.

A moment's consideration will disclose that this must be so, for there are only two possible constructions to be put upon this portion of the act in question, viz.: the phrase "in whole or in part." First, it must mean that when the legislature provides for a part of the common-law topic, it means to repeal only that portion covered

by the Act, leaving the remainder of the topic in force; or, second, by such provision it means to abrogate the common law covering the entire topic. For example: If the act were to declare that mayhem shall consist of the cutting off one's hand, and affix a punishment, this might be construed as merely changing the punishment for that particular mayhem, leaving the other varieties to be cared for by the common law; or it might be held as repealing all the common law of mayhem, and substituting therefor only the destruction of a hand.

But to give it the first construction would be to render wholly useless and nugatory the entire phrase, "in whole or in part;" for if these words were left out, the first construction would hold whether all or a portion only of the particular topic were legislated on. That is, to change the illustration, if conspiracy to rebel were the portion legislated on it would be a part of the common law which has "been otherwise provided for," leaving the rest of the body of the common law of conspiracy in full force and effect, and the additional words, "in whole or in part," neither add to nor take away from that construction.

If those words are to be given any effect there, it can only be by the construction contended for, the second one above. Thus if the whole law of conspiracy were attempted to be defined, or if only a part of that topic, in either case all the common law on that subject is repealed, as we contend.

Particularly should this construction be adopted in penal cases for the additional reason that it is in favor of liberty.

United States v. *Wiltberger*, 5 Wheat. 76.

That this was the understanding of the legislature seems clear; for, two years later (Laws 1870-1), they pass an act denouncing a penalty against railroad employees who conspire to cheat the railroad company. Later, in 1879, a law to punish conspiracies to abduct children. And finally, in 1889 (c. 374), an act to define and punish conspiracies against trade (so-called anti-trust act).

From 1834 to the present date the four above-named combinations are the only ones mentioned by the Statutes of North Carolina.

We conceive our argument to be greatly strengthened by the foregoing legislation. The object and purpose of the Act of 1868 was to enact a law of conspiracy respecting uprisings, and thereby in connection with sec. 641, *supra*, to repeal all common-law conspiracies. Experience showed that the law was inadequate and other acts were passed as above set out.

It may be urged that, since 1868, the Supreme Court of North Carolina has passed on the subject of conspiracy, and has again held the English common law on that subject to be in force.

Whatever may be said of the later cases, it must be conceded, we think, that no case prior to 1868 can possibly be an authority on the question of whether or not the Statute of 1868 operated as a *repeal* of the common law of conspiracy. The Younger case would still stand as a precedent as to what *was* the common law of conspiracy; but not at all pertinent to the effect of the Act of 1868.

The first case after 1868, on the nature and definition of conspiracy, was in 1880, *State* v. *Jackson*, 82 N. Car.

565. This was a conspiracy to indict a woman for infanticide. No point was made on the indictment, and the case was reversed for manifest error. The case of *State* v. *Brady*, 107 N. Car. 822, decided in 1890, did not discuss the nature of the crime, but only the frame of the indictment, assuming a combination to cheat and defraud to be a crime. In *State* v. *Turner*, 119 N. Car. 841 (1896), no question is raised on the charge, which was a combination to defraud insurance companies. *State* v. *Powell*, 121 N. Car. 635, and *State* v. *Wilson*, 121 N. Car. 650, both were in 1897 and both combinations to prostitute women. *State* v. *Mallett*, 125 N. Car. 718 (1899), was a conspiracy to cheat and defraud creditors.

The foregoing constitute all the cases on conspiracy since 1868 in which the combination was expresssly or impliedly held a crime. A reading of them leaves a sense of the utter inadequacy of the discussion, on the part of either court or counsel, of the nature of the crime. The strong impression is that counsel left the Court without assistance and that the latter failed to grasp the principles underlying the law. For example, it is gravely said that it is an essential ingredient to the crime that "the common purpose was carried into execution." (Turner case, *supra.*)

The point here insisted on, however, is that no reference whatever is made to the statutory condition of the offense, the statute adopting the common law and the effect of the Act of 1868, in conjunction therewith, in repealing the common law of conspiracy. This legal aspect does not seem to have occurred to counsel in these cases, and is not anywhere mentioned by the Court. It

results that the statute in that aspect has never received judicial construction in the State, and the decisions above recited cannot be binding until they shall have been considered in reference to the statute. It has not infrequently happened that a statute bearing on the case on hearing has been overlooked by court and counsel and the case decided without reference to its terms. In such event it has never been held that the decision was in any sense a construction of the statute.

THERE BEING NO LAW WHATEVER OF NORTH CAROLINA, STATUTORY OR COMMON, COVERING THE ACTS OF APPELLANTS, THE SENTENCE AND JUDGMENT WERE NOT "DUE PROCESS OF LAW," AND HENCE UTTERLY VOID.

This proposition is the correlative of the provision in our Constitution forbidding the States to pass *ex post facto laws*. If a State legislature may not, after the fact, make that a crime which was not theretofore a crime; so, on the other hand, State courts will not be permitted to adjudicate into crimes acts of a defendant on trial which were innocent at the time such defendant was indicted.

This latter proposition, we take it, was true even before the enactment of the XIV Amendment, under the authority of *Loan Association* v. *Topeka*, 20 Wall. 655; *a fortiori* is it true since the adoption of that Amendment.

We have become so used to a recurrence to the letter of our various Constitutions, National and State, that we are apt to overlook the existence everywhere in our country of unwritten constitutions, without which the mere written documents would be waste paper. No country ever succeeded with an alien made-to-order written constitution; no civilized country exists today with-

out some sort of an unwritten fundamental law. The English Constitution is as vigorous, as certain and as free as our own; though wholly unwritten. Connecticut had no written Constitution till 1818; Rhode Island, not until 1842.

We recognize and obey, and our courts enforce, the provisions of our unwritten Constitutions, just as we do the written provisions, because both are the product of the evolution of our race; they are a part of our mental and physical organization. These are the veriest platitudes stated alone, but it is not usual to see the statements brought together in their legal aspect; and yet this is perhaps their most important aspect.

Now, whether it be included in due process of law or not, or in the rights, privileges and immunities of citizens of the United States, or as a right guaranteed as fundamental by our unwritten Constitution, we submit that no State court can be permitted to create a wholly new crime and assess a penitentiary sentence on conviction thereof. Certainly not so long as the case of *Loan Ass'n* v. *Topeka* is an authority in this land. Suppose, for example, some State had revived the practice of Star Chamber, before the adoption of XIV Amendment, whereby defendants could be convicted and grievously punished without a jury, on *depositions* of witnesses without cross-examination and without counsel. Would not a Federal court say: "Our ancestors fought that engine of tyranny for two centuries. It well nigh destroyed our liberties. We abolished it in 1641. A few years later we chopped off a King's head quite largely on account of that very court. It has become an unwritten fundamental right for our citizens to be tried in

a wholly different way; and we will not permit a revival of the old." Such, at least, seems to us would have been a perfectly sound argument prior to 1868.

If a State should attempt to establish *lettres de cachet* as they existed under Louis XIV would not this court now say that they are not due process of law? And if so, where would we get our definition of "due process" except from our unwritten Constitution? Thus we push the matter back one step and that is all; we still reach the elder, the unwrittten law. We have discussed a slightly different aspect of this matter under subdivision 7 below, citing many decisions of this Court recognizing the principle now contended for. To these authorities we respectfully refer the Court, to be noted in this connection.

It may not be inappropriate to digress for a moment to call the attention of the Court to the fact that a vast deal of fustian has been written on the esoteric nature of this crime, its mystery, its secrecy and its dangerous character. It may well be granted that when the combination embraces a great number of people, as in widespread treasonable conspiracies or agrarian outrages, the statements are true; but when two or three combine merely to effect some private wrong, as in this case, such language is hyperbolical to the highest degree. If several, for example, get together in a room and agree to cheat some one or to commit any ordinary crime, the combination has absolutely harmed no one save the conspirators, and society is no whit injured. It is simply to misuse language to say otherwise. If now these conspirators begin to act, as a rule, little or no harm is done to society or the individual, until the object of the con-

spiracy is accomplished. When that is done, in all but an infinitesimally small portion of the cases, some substantive statutory crime has been committed, in which all are principals, or some principals and some accessories; and for which all may be punished at least as heavily and generally more harshly than for the conspiracy. The writer conceives there is little use for the law of conspiracy nowadays, except in the rare cases where the combination is discovered before executed. The legislatures of many States have recognized this reasoning, and have narrowed this field more and more. Some courts and many prosecutors, however, still insist on the "mystery" and the "danger;" but this, it is submitted, means only that it is easier to prosecute a conspiracy case, and more difficult to defend one, than any other kind in the books. In no class of cases have so many innocent persons been convicted. As said by Judge Campbell in *People* v. *Barkelow*, 37 Mich. 455, 457: "The course of legal experi-"ence has shown this to have been a familiar resort to "catch innocent persons, by throwing a drag-net of "vague charges and resorting to suspicions and preju-"dices to induce juries to convict persons who find it im-"possible to escape the malicious insinuations of false "accusers."

This digression has been ventured to show that the crime itself has been enormously exaggerated, probably because we connect the word conspiracy with great seditious and agrarian movements; and so the common offense shines almost wholly by reflected light. It will, therefore, be of no moment to the State of North Carolina if the crime be abolished by this Court. If her people wish a comprehensive law on the subject, it will be a simple matter to enact one.

2. *There was no statute of North Carolina authorizing this heavy punishment.*

The majority of the Court relies upon *State* v. *Mallett*, 125 N. Car. 718, but does not mention *State* v. *Jackson*, 82 N. Car. 565, which holds directly the contrary. The statute construed in the Mallett case is as follows: "Sec. 1097. Offenses made misdemeanors by statute, "where a specific punishment is not prescribed, shall be "punished as misdemeanors at common law, but if the "offense be infamous or done in secrecy or malice or "with deceit and intent to defraud, the offender shall be "punished by imprisonment in the county jail or peni- "tentiary not less than four months nor more than ten "years, and be fined." An examination of this section shows it to have been made up by consolidation of Bat. Rev., ch. 32, sec. 29 and sec. 108. The Jackson case was decided before this consolidation. The sections are as follows: "Sec. 29. Every crime or offense whatever "heretofore punishable by the laws of North Carolina "when the present constitution went into effect with pub- "lic whipping or other corporeal punishment, shall here- "after, in lieu of such corporeal punishment, be punished "by imprisonment in the State's prison (or county jail) "for not less than four months nor more than ten years."

"Sec. 108. Offenses made misdemeanors by statute, "where a specific punishment is not prescribed, shall be "punished as misdemeanors at common law, but the pun- "ishment prescribed in Sec. 29 of this Chapter shall be "used only for crimes that are infamous, or done in "secrecy and malice, or done with deceit and intent to "defraud." It is perfectly manifest from an inspection of these three sections that the first is made up by con-

solidating the last two; and that the latter part of the first section applies only to "offenses made misdemeanors "by statute." This latter proposition is established by the historical aspect, as just shown, for certainly section 108 has reference only to the statutory crimes, and, in the consolidation, its meaning is not extended.

The proposition is also clear and certain from the grammatical construction of the section. The Jackson case, *supra*, so held.

The Mallett case changes that ruling, without citing the Jackson case, on the theory that a conspiracy to defraud is "one 'done with deceit and intent to defraud.' "It is the very essence and substance of it." No attempt is made to explain away the opening phrase of the statute: "Offenses made misdemeanors by statute;" but it is baldly assumed that the latter half of the section refers not only to statutory misdemeanors, but also to all non-statutory common law offenses of that grade; an assumption not tenable under any of the known rules for statutory interpretation. But even conceding for the moment that common law misdemeanors are included within the punishment portion of the section, yet is the interpretation of the Court in the Mallett case and this case wholly indefensible on sound principles. "Deceit" and "defraud" must be used in their technical and not in any loose colloquial sense, since the statute is criminal and one prescribing an exceedingly harsh punishment. This is elementary. Now deceit and fraud at common law in their criminal aspect embrace only the use of false weights, tokens or measures, or a cheat effected by a conspiracy. *King* v. *Wheatley*, 2 Burr. 1125. In the exhaustive examination of the law by the twelve judges

of England in the case of *Reg* v. *Bryan*, 1 Dears. & B. 265, a Crown case reserved, the bench consisted of Lords Campbell, C. J., Cockburn, C. J., Pollock, C. B., Coleridge, Cresswell, Erle, Crompton, Crowder, Willes J. J., and Bramwell, Watson and Channell, barons, probably as learned a bench as ever sat in England. Each judge delivered an opinion, ten concurring, Bramwell, *dub.*, and Willes, *diss.* This was under a very broad statute, 7 & 8 Geo. 4, c. 29, § 53, which provides that if any person shall "by any false pretense" obtain the money, &c., of another with intent to cheat he shall be guilty, &c. The substance of this decision is that there are many false pretenses which do not constitute a cheat within even the all-embracing language of the statute of Geo. IV.

In North Carolina the Court has always held that a cheat must be by false token, weighs or measures, in order to be criminal. In *State* v. *Justice*, 13 N. Car. 199, though the fraud was "flagrantly marked with moral "turpitude," yet because there was no false or public token, nor any practices which would deceive the public at large, it was held no crime. "Civil injuries," say the Court, "should not be the subjects of criminal prosecu-"tions. Good policy does not require the multiplication "of public offenses." See also *State* v. *Politto*, 11 N. Car. 348; *State* v. *Alfred*, 84 N. Car. 349; *State* v. *Phifer*, 65 N. Car. 321; *State* v. *Burke*, 108 N. Car. 750.

An exhaustive case by the Supreme Court of the District of Columbia is that of *U. S.* v. *Watkins*, 3 Cranch C. C. 441.

Again, the Statute uses the word "done;" done with deceit. This implies a finished crime accomplished by

the deceit of some person. But the crime here under consideration was "done" before ever Garrett was seen by any of the defendants. It was "done" when the minds of the alleged conspirators met, prior to the time that any representations were made to the prosecuting witness, and before ever he was aware of the existence of the actors. This is as old as 27 Ass. 34, 44. How then can it be said that this offense was "done with "deceit and intent to defraud?"

Finally, this ruling must be wrong, because by the more than doubtful construction of a doubtful statute the settled criminal law of North Carolina has been changed, and changed into a much harsher channel. It is against all precedent and against reason to suppose the legislature meant to make this radical change by *implication*. That body had named and defined two classes of criminal conspiracies and prescribed a maximum punishment of ten years. Rev. Code, § 974; R. C., § 1107. Why enact these laws if they were already covered by §1097 and the same punishment therein provided? It is said that Nero wrote his edicts in small type and hung them up almost out of sight. 1 Colquhoun Roman Law 316 n. 5. It is submitted that that was no worse than this act of judicial interpretation, overruling the Jackson case, without mentioning it, and establishing this greater punishment, theretofore unknown in the State.

It is a rather curious fact that in the reference to § 1097 in the opinion in the Mallett case, the writer does not *quote* that section, but its legal effect only is attempted to be stated, and that in a manner which the text of the law is far from justifying. It is stated as if the section were divided into two parts; the first re-

ferring to statutory misdemeanors, and the last, as if *in terms* it embraced *all* misdemeanors, statutory or at common law. See p. 723 of opinion.

It has been frequently held by this Court that it will not interfere with the construction of a State statute by the State courts; but is this a hard and fast rule, subject to no exception? Suppose such a construction denies a citizen of the United States some "fundamental" right which belongs to him as a member of a free government. must the rule still apply? We have endeavored in subsection 7, *infra*, to elaborate this question; and to that we respectfully refer the Court for the extended argument, pausing here to make a single suggestion. Suppose a statute of a State defined murder as a felonious killing, with malice, &c., prescribing the death penalty; and the State courts should uphold, under that statute, a capital sentence under a simple assault charge. Would the rule of non-interference by the Federal courts still hold? If this be an exception to the rule, then somewhere between the instance of a manifestly proper interpretation of a State statute by State courts and the extreme case put, must lie the dividing line. It is suggested that the following should be the test: If the construction put upon the statute by the State court be so manifestly wrong that the Federal court, on undisputed canons of construction, can unhesitatingly say the State court is in error; and further, if such error be to the prejudice of some fundamental or constitutional right of a citizen of the United States, then it would be the duty of the Federal court to set aside the judgment of the State tribunal based on such erroneous construction.

Such is this case.

3. *The sentence was not due process of law, because*

greater than can be inflicted for the offense in any other American judicatory.

Montesquieu says: "It is an essential point that there "should be a certain proportion in punishments, because "it is essential that a great crime should be avoided "rather than a lesser." I. Sp. Laws, Bk. VI., ch. 16. Grotius discourses at length on the proportion that should exist between crimes and their respective punishments; and places in the lowest scale, as deserving the least punishment, "those criminal designs, which have proceeded "some degrees, but not to the last stage of completion." De Jure, ch. xx., par. xxx. In an altogether admirable essay on Prison Ethics, Mr. Herbert Spencer points out the evils of excessive punishments for crimes, admitting that in the less advanced stages of civilization a harsh code is needful. But as men progress in manners, severe punishments, instead of being deterrent, actually defeat the preventive object of society by exciting in the mind of the criminal a sense of injustice and animosity, causing him to dwell on the injury done to him by society rather than on his own misdeeds. Thus he nurtures a spirit of revenge rather than a desire for atonement, and on his enlargement reënters society a worse and more dangerous man than when he left it. Essays, Moral, &c. D. Appleton, 1884, pp. 218 *et seq.*, 239 *et seq.* The illogicality of such sentences was demonstrated in England in the 18th Century. When a slight crime was punishable with death, the offender was not at all likely to stop at a greater. As well be hung for a sheep as a lamb; and so, instead of exercising a deterrent influence on minor criminals, the bloody code directly encouraged grave offenses. Leckey in 6 England in XVIII. Cent. 245 *et seq.*, draws a graphic picture of crime and its

punishment during that time. Among other evils of harsh punishments he points out the constant perjury of juries in their unwillingness to condemn to death for trivial offenses.

But the best commentary on this sentence is the 8th Amendment to our Constitution, by which cruel and unusual punishments are prohibited. No point is made in this connection that this amendment applies in a legal sense to the case at bar. The broad statement is hazarded that the provision quoted expresses the genius of the American people; that it declares a fundamental principle among us that an excessive punishment is abhorrent to our system of judicature; and that crimes and punishments should bear some relation of proportion to each other. In short, that as a people we are opposed to arbitrary and excessive punishments. The framers of our Constitution were either fresh from England, or they knew by observation or mediately from their parents, the details of the "bloody code." The Eighth Amendment was the revolt from these extreme punishments.

The truth of the foregoing is made manifest by the legislation of the various States of our Union on the subject of the punishment of conspiracies:

Arizona, one year and $1,000; P. C. § 170.

California, one year and $1,000; P. C. § 182.

Connecticut, to burn public buildings or State military stores, five years; to commit high crimes, five years; other conspiracies, one year, $300; G. S. (1888), §§ 1422, 1642.

Minnesota, three months and $100; G. S. (1894), § 6424.

Alabama, conspiracy to commit felony, six months and $1,000; to commit misdemeanors, three months and $500; Crim. Code (1896), §§ 4428-9, 5414.

Arkansas, conspiracies to overthrow State or intimidate courts, evidenced by some overt act of violence, one to fifteen years; other conspiracies, three months and $100; Ark. Dig. (1894), §§ 1505, 600, 601.

Florida, defined conspiracies, one year and $1,000; common law conspiracies, one year and $500; R. S. Fla. (1892), §§ 2593, 2370.

Georgia, conspiracy to cheat State or county, two to ten years; to indict an innocent falsely, who is accordingly indicted and acquitted, one to five years; misdemeanors, punishment not specified, six months and $1,000; 3 Code (1895), §§ 287, 118, 1039.

Idaho, conspiracies, one year and $1,000; Penal Code (1901), § 4686.

Indiana, "white cap" conspiracies, two to ten years and $2,000; to commit felony, fourteen years and $5,000; conspiracies to falsely indict, six months and $1,000; 1 R. S. (1901), §§ 2065, 2260, 2261.

Indian Territory, conspiracies to overthrow government or intimidate court, evidenced by forcible acts, one to fifteen years; other conspiracies, three months and $100; Stat. 1899, §§ 1164, 1165, 1167, 465r.

Kansas, to obstruct railroads, ninety days and $200; others, one year and $500; G. S. (1901), §§ 2376, 2106.

Kentucky, false prosecutions, twelve months and $100; Stat. 1899, § 1341.

Louisiana, to murder, rob, rape, commit burglary, arson, perjury and forgery, two years and $1,000; to

assault and drive from homes, one year and $1,000; Rev. Laws 1896, p. 215.

Maine, to indict falsely, five years, $1,000; to injure an individual or act injurious to public health, &c., three years and $1,000; R. S. Me. (1883), p. 916, §§ 17, 18.

Michigan, no statutory conspiracy, common law crimes, two years and $2,000; but see *in re* Lamphere, 61 Mich. 105.

Missouri, defined similar to New York, twelve months and $200; R. S. Mo. (1899), §§ 2153-4.

Montana, defined similar to New York, one year and $1,000; Code (1895), § 320.

Nebraska, conspiracy to indict, one year and $1,000; Comp. St. (1901), § 1675.

New York, defined at length; treasonable conspiracy against State, ten years; others, one year and $500.

Ohio, "white cap" conspiracy, two to ten years and $2,000; no common law crimes; 2 Bates. St. (1900), § 6895.

Oklahoma, defined similar to New York, one year and $500; Okl. St. (1893), § 2061.

North Dakota, defined as in New York, one year and $500; Penal Code (1899), §§ 7037, 6812.

New Jersey, defined similar to New York, two years and $500; 1 G. S., N. J. (1895), p. 1093, § 236.

Rhode Island, one year and $1,000; G. L., R. I. (1896), p. 1013.

South Carolina, conspiracy to prevent citizens from voting, &c.; Cr. Code (1902), § 233. No other statutory conspiracy. Common law offenses punishable by

jail sentence and fine in accordance with common usage and practice in the State.

Tennessee, defined as in New York, also common law conspiracies are misdemeanors, but no punishment seems to be prescribed. Conspiracy to indict one falsely of a felony, two to ten years; Code Tenn. (1896), §§ 6693. 6694.

Texas, defined to be an agreement to commit felony: conspiracy to murder, two to ten years; conspiracy to commit other felonies, two to five years; Penal Code (1895), §§ 957, 958.

Wisconsin, no statutory definition, one year and $500; 2 Saub. & B. Ann. St., § 4568.

Virginia, to incite negroes to violence, five to ten years; other conspiracies, jail and fine in discretion of court.

West Virginia, "vigilance committee," one year and $500; others, fine and jail in discretion of court.

Washington, not defined, one year and $500; Code (1896), §§ 5906, 6488.

Illinois, conspiracy to indict, one year and $1,000; to "boycott," to commit felony, &c., common law conspiracies, five years and $2,000; R. S. Ill., ch. 38, §§ 45, 46.

4. *The sentence was not due process because so severe that it raises the presumption that vindictiveness, passion and sectional hatred entered into the judgment of the trial court.*

Three men agree together, let us assume, to obtain the money of a certain liquor dealer named Garrett by means of false pretenses. One of the trio approaches this worthy man, and, pursuant to the agreement, makes certain false

representations to him. Garrett at once fathoms the scheme and calls the attention of his clerk to the departing schemer, saying: There goes "a genuine gold-brick "man" (312 Trans., 69). The plot became abortive from that moment; it never had the slightest chance of success. Thereafter, Garrett, instead of at once denouncing Howard to the authorities, tolled him on, encouraged him, prevented his backing out at the last moment (312 Trans., 73, 75-80, 85); all for the purpose of setting up a false and fraudulent claim to some $2,000 worth of property of defendants (312 Trans., 86, 87). So far as the crime of these appellants is concerned, it seems to be the very mildest conspiracy possible. It deceived no one; it never had the least chance of success; it began and ended in the mere agreement of the plotters; it died at birth. For this abortive attempt, two receive the tremendous sentence of ten years, the third seven.

Look now upon this picture! A man and a woman (presumably husband and wife) agree together to destroy the virtue of a seventeen-year-old girl. The devilish arts used are not disclosed, but the plot succeeds, and a young life is ruined. Only a credulous child's virtue is gone, only a girl's life wrecked. Surely this is but a venial sin; Garrett's dollars are safe, and so the offense being trivial. a trivial punishment will suffice. Two years for the man, nothing for the woman! This is the measure of justice which satisfied the Courts of North Carolina in the Powell case, *supra*. With right-thinking men an attack upon the virtue of a woman necessarily arouses righteous indignation which often hurries them to excess; and therefore had these sentences been transposed; had the destroyer of virtue been sentenced to ten years and the plotters for lucre and gain received two, most people

would say that justice had not gone astray; but, regarding the actual fact, it would seem clear that the passion was not aroused at the sight of a ruined child, but at the contemplation of men from Chicago going down to North Carolina with intent to defraud one of the citizens of that State of his money. Looking at the *sentences* in the respective instances alone, this is a fair conclusion. But there are other elements in this case pointing in the same direction. In spite of a positive law of the State commanding the trial judge to charge on the presumption of innocence, and to charge that such presumption is to be regarded as affirmative evidence of innocence in favor of the accused until overcome by proof of guilt beyond a reasonable doubt, in spite of the fact that such an instruction was specifically asked at the trial (312 Trans., 113, instr. XIV.), the Judge neglected and refused to so charge; and when the case was in the Supreme Court, the point was made and earnestly pressed (312 Trans., 133, Assgt. Error 14, 15). Yet the majority opinion included the error in the category of those exceptions that were "without merit" (312 Trans., 20).

Again, it has been decided in North Carolina that a defendant is entitled to a bill of particulars in a criminal case when the indictment is not specific. *State* v. *Brady*, 107 N. Car. 822, 827. In the case at bar such a bill was prayed and denied, exception taken and the point urged in the Supreme Court (312 Trans., 61, 62; Excep. 1, Tr., 122; Assgt. Error, 1). Defendants then went to trial on the three counts of the indictment, not knowing whether the State would attempt to prove a conspiracy to rob or one to defraud. (See indictment 312, Trans., 60, 61). At the close of the evidence for the prosecution, the State "*nolled*" the second and third counts and

elected to ask a conviction on the first, "the other counts "to be referred to as furnishing particulars" (312 Trans., 106). This charged merely a conspiracy by false pretenses to defraud one Paul Garrett, nothing more. The counts referred to as furnishing particulars charged, respectively, a conspiracy to assault and rob and a conspiracy to cheat and defraud by the false pretenses that the plotters owned certain gold bars, and *nothing more!* (312 Trans., 60, 61). Judge Clark, in the Supreme Court, said: "The particulars were fully furnished by the sec- "ond and third counts, * * * so that they (defend- "ants) were in full possession of all the information a "bill of particulars could have furnished them" (313 Trans., 15). Judge Douglas vigorously protests against this view (313 Trans., 22). Just how a count on a conspiracy to rob or one alleging the ownership of gold bars, could give any information as to the nature of the offense to defendants, the writer confesses his inability to fathom.

Yet again, in flat violation of the law of the State, the trial judge singled out the prosecuting witness, Garrett, while the panel was in the court room on the motion for the rule on the witnesses, and again in his charge, for commendation (312 Trans., 64, 119). Judge Clark evades the first exception by saying the statute applies only to the instructions to the jury; and is silent as to the special commendation of Garrett by the trial judge in his charge (312 Trans., 19). This latter objection was probably also "without merit;" though Judge Douglas had a strong opinion to the contrary (313 Trans., 23-27).

And again, after the arrest and hence after the conspiracy had fully ceased, all sorts of declarations and acts of the various defendants, in the absence of one or more

of them, were introduced (over objection) as evidence against the absent ones. For example, the card with Hawley's name (312 Tr., 93, 99, 100); the trunk check taken from Daley (Tr. 94); the contents of the trunk and of the case (Tr. 94, 95, 104); statements of Hawley, when arrested, and his attempt to destroy a certain letter (Tr. 100). This was in violation of the plainest rules of evidence, even in North Carolina. 3 Greenl. Ev., sec. 94; *State* v. *Dean*, 35 N. Car. 63; *State* v. *Collins*, 121 N. Car. 667.

We are well aware that some of these matters are not Federal questions, but they are recited to show that, law or no law, it was intended by the majority of the Court that this sentence should stand; and the manifest errors in the majority opinion, taken in connection with the heavy sentence, do show a passion, a prejudice against these defendants; and do further show that they were not convicted and punished by the "law of the land," as stated in the dissenting opinion of Judge Douglas.

After a long generation sectional differences are happily fading out in our country. Not the least benefit of the Spanish war is that it greatly hastened the era of restored mutual trust and confidence between the North and the South. In an entirely proper spirit, however, State pride is strong; and it is necessary, in our dual system, that it should continue to be so. Out of this feeling has grown of late years a system of reciprocity between States. This is particularly noticeable in legislation in several of the States respecting corporations, especially insurance companies, by which certain foreign corporations are accorded privileges, provided the corporations of the legislating state receive the same or like privileges

in the domicil of the foreign company. For an example, see Ills. Stat. Hurd's Rev., ch. 73, sec. 227.

Inseparably bound up in the notion of reciprocity is that of retaliation. Let any one State, through its courts and juries, systematically discriminate against the citizens of other States; even though those citizens be criminals, and retaliation will surely follow. This is a consummation most earnestly to be avoided. We submit this consideration should have weight with the Court.

5. *The sentence is not due process because our people are opposed to judge-made crimes, and tolerate them only when followed by mildest punishments.*

To a freeman nothing is more abhorrent than a system of laws which leave punishable acts undefined; and he is right, for nothing is more subversive of liberty. This was the main complaint against Star Chamber—this undefined, illimitable jurisdiction, which was not only unrestricted as to the nature and amount of punishment, but was bound by no pre-ascertained definition of offenses. An evidence of the feeling is the condemnation of Nero, grown into a proverb, for hanging his laws so high that they could not be read. That such is the general sentiment of the American people is shown by their legislation on this topic in the various States, elsewhere set out.

Fitz James Stephens in his History of Criminal Law (Vol. 3, p. 360, *et seq.*) very justly remarks that in a rude state of society, when legislation is scanty, it is inevitable that to the judges should be committed the power to declare new offenses; but in modern times practically all possible crimes have been defined, and should new circumstances arise, the legislature can promptly meet the emergency with a statute. To this may be added the

reflection that as a people advances in civilization and liberty, they become less and less tolerant of confiding to a single judge or even a bench any vague and undefined powers which may affect the security of the individual from arrest and punishment. In 1854 Mr. Justice Crompton, in his observations on the scheme for codification of the criminal law, advocated the retention by the judges of the power to declare new offenses. 3 Steph. Cr. L., 359. Certainly the learned justice was scarcely the person to ask such a power. In *Hilton* v. *Eckersley*, 6 E. and B. 47, some cotton spinners entered into a bond to work only as the majority should decide. Crompton, J., thought the agreement was an indictable conspiracy. Lord Campbell, C. J., could not bring himself to believe that such an agreement to raise wages, unaccompanied with any design to use violence, was an offense. This was in 1856. Had the workmen been tried before Crompton, they would have gone to jail; Lord Campbell would have discharged them. In United States Courts, in New Hampshire, Massachusetts, New York, Michigan, Maine, Vermont, Iowa, Kentucky and Pennsylvania it is not a crime to combine to defraud by false pretenses, unless the pretenses consist of false weights, measures or tokens or some other means *criminal* in themselves.

State v. *Parker*, 43 N. H. 83; *Comm.* v. *Eastman*, 1 Cush. 189; *Comm.* v. *Wallace*, 16 Gray 221; *Lambert* v. *People*, 9 Cow. 578; *Alderman* v. *People*, 4 Mich. 414; *People* v. *Barkelow*, 37 Mich. 455; *State* v. *Mayberry*, 48 Me. 219; *State* v. *Stephens*, 30 Iowa 391; *Hartman* v. *Comm.* 5 Barr. 60; *Comm.* v. *Ward*, 92 Ky. 158; *State* v. *Keach*, 40 Vt. 113; *U. S.* v. *Walsh*, 5 Dill. 58.

On the other hand the States of Illinois, Maryland, New Jersey and others hold that combination to cheat

and defraud by whatever means is criminal. *Cole* v. *People*, 84 Ill. 216 (with a vigorous protest from Scholfield and Dickey, J. J., the former one of the ablest of the Illinois judges); *State* v. *Buchanan*, 5 Har. and J., 317; *State* v. *Cole*, 10 Vroom 324.

"Under which King, Bezonian!" All these courts profess to declare the same common law, though they differ radically as to what that law is; and yet the layman must know *in advance* what a particular court will decide, at his peril of a jail, or in North Carolina, a penitentiary sentence! When the punishment for the judge-made crime is slight, such as a small fine or a short jail sentence, we may be content to permit the practice to continue, but when in such cases a ten-year penitentiary sentence may be awarded—this must give us pause.

In several of the States conspiracy is defined and the statutes expressly declare that no other combinations shall be deemed criminal. In none of the acts, be it observed, is the judge-made conspiracy to do an *unlawful* act, or a lawful act by *unlawful* means, included.

Conspiracies defined, and no combinations other than such are punishable.

Arizona, Penal Code, § 3.

California, Penal Code (1899), § 182.

Minnesota, Genl. Stat. (1894), § 6424.

Montana, Code (1895), Penal Code, § 322.

New York, Penal Code (1900), § 170.

North Dakota, Penal Code (1899), § 7039.

No crimes except statutory. Common law crimes not punishable.

Arizona, Penal Code, § 3.

California, Penal Code (1899), § 6.

Georgia, there appears to be no common law crimes.

Indiana, 1 R. S. Ind. (1901), § 237.

Montana, Code (1895), § 6.

Nebraska, apparently none but statutory offenses.

Ohio, no common law offenses, *Mitchell* v. *State*, 42 Ohio St. 383.

Oklahoma, Stat. Okl. (1893), § 1838.

North Dakota, Penal Code (1899), § 6801.

Texas, Penal Code (1895), § 3.

The objections to judicial legislation are many and serious. The principal ones are admirably summed up by Austin in his Jurisprudence, Lect. 39, part 1: First, the difficulty in deducing, from the vast mass of adjudicated cases, the true *ratio decidendi*, and as a corollary, the necessary ignorance of the entire laity of the rule of law which they are conclusively presumed to know; *second*, many of these rules, from the nature of the case, are laid down in haste, for often the *nisi prius* judge must announce them; *third*, a new rule is always *ex post facto* or retroactive as to acts done prior to the time of its first enunciation; *fourth*, there is no test of the validity of a rule announced from the bench. It may be and frequently is overruled or modified by subsequent judicial decision. An act may be innocent to-day, criminal to-morrow; or criminal to-day and innocent to-morrow. It must be conceded that if all our criminal law thus rested in the bosom of the judge, the situation would be intolerable. That any portion of it so rests is a difference in

degree only, and is subversive of liberty and un-American to the extent that it rests in judicial discretion.

In his Civil Government, Locke says: "For all the "power the government has being only for the good of "society, as it ought not to be arbitrary and at pleasure, "so it ought to be exercised by established and promul- "gated laws, that both the people may know their duty, "and be safe and secure within the limits of the law, "and the rulers, too, kept within their due bounds." Locke, Bk. II., ch. 10, § 137.

The earliest reference we have found to the principle that all laws ought to be promulgated and known before one should be punished for their infraction is in Domat (Vol. 1, § 16). He cites as his authorities *9 Cod. de legibus; 12 Cod. de jur. et fact; § 1 in fin. in prooem. Inst.; 2 Cod. de in jus voc.* Doubtless the references do not support the text, for the extraordinary jurisdiction of the judge in Imperial Rome was not consistent with the proposition. However, the statement is valuable in this that it expresses the sentiment of the ablest continental lawyer of the 17th century, and Domat's text, without doubt, has had no little influence in bringing about the condition which now obtains in all European states whereby there are no crimes except those defined by statute.

In the Penal Code Napoleon of 1810, Art. 4, it is provided: "No contravention, no delict, no crime can be "punished (punis de peines) which has not been promul- "gated (prononcé) by law before its commission."

All the newer codes of Europe, as above stated, recognize the doctrine that there can be no punishment inflicted

except for a crime previously defined by legislation. (See Dr. Hammond's note J to Lieber's Hermenentics.)

The danger of manufacturing new crimes which are within the "reason," but not the language of the statute is well pointed out by Mr. Ch. J. Marshall, in Wiltberger's case, 5 Wheat. 76, 96. A strong expression to the same effect is found in the opinion by Mr. Justice Washington in *U. S.* v. *Sheldon*, 2 Wheat. 119, 121. See also opinion by Taney, Ch. J., in *U. S.* v. *Morris*, 14 Pet. 464. 475; and No. 62 of the Federalist.

In some of the colonies the principle that no act was criminal save those enumerated by the statute or expressly provided for in the Word of God was early adopted. Massachusetts. See Body of Liberties, p. 1, Hutchinson, State Papers, 205. The common law of England is not mentioned. In Connecticut the Code of 1642 is copied from that of Massachusetts. Conn. Records, I., 77. In New Haven Divine law was the original guide in civil and criminal matters, not the common law. 1 New Haven Records, 1. In Rhode Island a Code was adopted in 1647, set out in full in 1 Arnold, Hist. R. I., 205. Crimes were defined, and it was provided that "in all other "matters not forbidden by the Code all men may walk as "their conscience persuades them."

The modern sentiment is well shown in the following extract from the opinion in the Matter of Lamphere, 61 Mich. 105; 108. Campbell, C. J. (one of the ablest of western judges) remarks: "And while we have kept in "our statute books a general statute resorting to the com- "mon law for all non-enumerated crimes, there has always "been a purpose in our legislation to have the whole "ground of criminal law defined, so far as possible, by

"statute. * * * The punishment of all undefined "offenses is fixed within named limits, and beyond the "unregulated discretion of the court." And again on p. 109: "Whatever elasticity there may be in civil matters, "it is a safe and necessary rule that criminal law should "not be tampered with except by legislation."

There is no doubt that this last statement expresses the sentiment of the American people, for it commends itself particularly to their sense of justice and their desire for security.

6. *The trial was not due process because the judge below refused to charge on the presumption of innocence.*

In *State* v. *Heaton*, 77 N. Car. 505, 508, it is said: "As men do not generally violate the criminal code, the "law presumes every man innocent, and this presumption "of innocence is to be observed by the jury in every case."

This instruction was asked and refused by the Court, no reason being assigned; and, worse still, the charge implies that no such presumption exists.

Independent of an express decision, this Court has drawn a sharp distinction between "presumption of inno- "cence" and "reasonable doubt;" and holds that both are necessary elements in a criminal case for the proper legal protection of the accused. The former is considered to be affirmative evidence in the defendant's favor; the latter a burden cast upon the prosecution. Each is, in a manner, the correlative of the other. Estimated quantitatively, if the presumption be neglected, a very small amount of proof might overcome, in the minds of the jury, the reasonable doubt of guilt; but put the presumption in the scales, in turn the slight proof is overcome, and more evidence of guilt becomes necessary on the

part of the prosecution. It is plain, therefore, that the presumption is a vital matter for the accused in every criminal case. That such a presumption exists in our criminal law is, as this Court say: "Axiomatic and ele-"mentary, and its enforcement lies at the foundation of "the administration of our criminal law." Again, the principle is called "vital and fundamental" and a warning is thrown out that it "be not denied, when requested, "to any one accused of crime."

Coffin v. *U. S.*, 156 U. S. 432.

The writer is well aware of the polemical and somewhat acrimonious criticism by the late Professor Thayer of the distinction taken in this case; but a careful perusal of his essay serves only to make the distinction more apparent and the application of the rule the more necessary, so long as we adhere to the doctrine that the presumption exists and is a legal right of an accused. See Thayer Prelim. Tr. Ev. Appendix B.

The Coffin case was explicitly affirmed on this point by this Court in *Cochrane* v. *U. S.*, 157 U. S. 286, 292; and *Kirby* v. *U. S.*, 174 U. S. 47, 55; and is referred to with approval in *Allen* v. *U. S.*, 164 U. S. 492; *Agnew* v. *U. S.*, 165 U. S. 36.

If, as said in the opinion in the Coffin case, the presumption of innocence is "vital and fundamental," it comes within the express language of the cases of *Brown* v. *New Jersey*, 175 U. S. 172; *in re* Kemmler, 136 U. S. 436; and *Hurtado* v. *State*, 110 U. S. 516, more fully cited in subdivision 7 *infra*. A denial of such a right by any instrumentality of a State, therefore, is a denial of due process of law.

Moreover, in this particular case, it is a discrimination against these appellants; for the law of North Carolina, as shown, prescribes that trial courts must, when requested, charge on such presumption. A refusal so to do, on request, is to deny the particular defendant the equal protection of the laws. It will not do to say that full instructions were given the jury in this case on reasonable doubt, for, as shown above, and as expressly held in the Coffin case, the two are not equivalent terms; and that a defendant may have that full measure of justice given him which the law commands, the charge to the jury must embrace both propositions.

7. *The indictment charges no offense whatever. It is therefore* (a) ***not due process of law; and*** (b) ***it is a denial of the fundamental right of every American citizen to be informed of the nature of the accusation against him.***

(a) It is not due process of law.

Conceding for the sake of argument that at common law there are various combinations outside of the Edwardian Statutes which are criminal; conceding that among them is the offense of conspiring by certain kinds of false pretenses to cheat and defraud another; yet this indictment fails to change any such offense, and a conviction thereon is not due process of law.

We are well aware of the line of decisions of this Court which hold that the Federal Courts will not interfere with State rulings in matters of procedure, or in matters touching the frame of the indictment, or a change in the constitution of a State Court, or a change in the jury system, or the abrogation of the grand jury. These are but matters of form covered by local statutes. But the question

here involved lies deeper and is far more serious. "An "illustration is no argument," says Tristram,—"nor do I "maintain the wiping of a looking-glass clean to be a "syllogism;—but you all may, if it please your worships, "see the better for it." As an illustration, then, suppose a citizen of the United States were indicted for imagining the Governor's death and the State Supreme Court were to decide that the offense was covered by the usual statute defining murder, and sustain a death sentence; or suppose an indictment charging murder generally, with no time, place, weapon, intent, malice or prepence or name or description of the person killed alleged; would this Court hold either "due process of law?" Strip the count of this indictment on which defendants were convicted of its verbiage, and it charges simply a conspiracy by false pretenses to cheat and defraud Garrett. Even Judge Clark admits this insufficient for he concedes that defendants were entitled to a bill of particulars (312 Tr., 17), and states what is not in accordance with the truth or the facts in the record that defendants "were in full "possession of all the information which a bill of particu-"lars could have furnished them." Let us pause for a moment to examine this statement. The first count charges a conspiracy to cheat Garrett by false pretenses, and no more; the second, a conspiracy to assault Garrett, put him in fear of his life and thus feloniously "to steal, "take and carry away" his money from his person; the third, a conspiracy to cheat and defraud Garrett by the false pretenses that defendants owned mining interests and "large blocks of gold," *nothing more.* The last two counts were *nolle prossed,* with the reservation that they might "be referred to as furnishing particulars" (312 Tr., 106). The evidence was all directed towards proving

the notion that the combination was to defraud Garrett by some undefined false representations; the theory of robbery was not touched on; and the facts adduced fairly considered, were entirely consistent with the theory that the plan was to persuade Garrett to come into the combination and afterwards to cheat some one else. Now, under such circumstances to say that the two counts *nolled* gave defendants full information is a ruling:

> "That palters with us in a double sense,
> That keeps the word of promise to our ear,
> And breaks it to our hope."

It is simply not true that defendants had full information, as Judge Clark says; and as to this, we put ourselves upon the record. How, then, were defendants apprised of the charge against them? Not by the indictment and not by the bill of particulars, so-called.

Were they to prepare to meet a conspiracy to assault and rob Garrett? If the second count furnished the particulars, then were they tricked, not by the State's solicitor, but by the Court itself. If they relied on the third count, then no false pretenses whatever were set out, and no defense necessary, and again they were tricked.

The Constitution of North Carolina provides: "In all "criminal prosecutions, every man has the right to be "informed of the accusation against him." Art. I., sec. 11. By § 1183 (1 Code N. Car., 1883) it is provided: "Every criminal proceeding by warrant, indictment, in- "formation or impeachment shall be sufficient in form for "all intents and purposes, if it express the charge against "the defendant in a plain, intelligible and explicit man- "ner; and the same shall not be quashed, nor the judg-

"ment thereon stayed, by reason of any informality or "refinement, if in the bill or proceeding sufficient matter "appears to enable the Court to proceed to judgment."

On the one hand it is plain that the indictment does not fulfill the constitutional provision; nor, on the other, is it cured by § 1183, *supra*.

The rule of law, now believed to be universal in this country and England, is that an indictment charging a conspiracy to cheat and defraud, without more, is fatally defective; or else so defective as that a bill of particulars is matter of right and it is fatal error to refuse it. *King* v. *Gill*, 2 B. and Ald. 204; *Rex* v. *Hamilton*, 7 C. and P. 448; *State* v. *Parker*, 43 N. H. 83; *Comm.* v. *Eastman*, 1 Cush. 189; *Comm.* v. *Wallace*, 16 Gray 221; *Lambert* v. *People*, 9 Cowen 578; *Alderman* v. *People*, 4 Mich. 414; *People* v. *Barkelow*, 37 Mich. 455 (Cooley, C. J., and Campbell, J., were then on the bench; and the opinion contains a strong statement by the latter as to the reasons on which such vague pleading is condemned). *State* v. *Stevens*, 30 Iowa 391; *Hartman* v. *Comm.*, 5 Barr. 60; *Williams* v. *Comm.* 34 Pa. St. 178. (In this last case the fustian indulged in by some most respectable Courts about the secrecy of the offense and other mysterious and esoteric qualities is exposed. The offense "can be as readily "*laid* as proved," says the Pennsylvania Court.) *State* v. *Crowley*, 41 Wisc. 271; *State* v. *Cardoza*, 11 S. Car. 195; *State* v. *Mayberry*, 48 Me. 219; *U. S.* v. *Walsh*, 5 Dill. 58. (In this case Judge Dillon gives an excellent review of the cases, and repudiates the English doctrine as announced in the Gill case, *supra*.) *Comm.* v. *Ward*, 92 Ky. 158; *State* v. *Keach*, 40 Vt. 113.

In those jurisdictions where the vague indictment is

upheld, a bill of particulars is awarded. *McDonald* v. *People*, 126 Ill., 150; *State* v. *Brady*, 107 N. Car., 822.

The argument that this Court will not consider as Federal any question which involves a State's ruling on its internal police will doubtless be urged. There is no adjudication by this Court either for or against the proposition, on the application of a non-statutory *general rule of substantive criminal law* of the several States considered in connection with the inhibition of the XIV. Amendment. The rulings thus far are only on the *adjective*, and substantive law embraced in statutory enactments and the interpretation thereof by State tribunals. As to these the Court say there are no Federal questions, since each State is supreme in that province. But a strong argument can be made from analogy. And first let it be noted that this Court is and always has been sedulous to protect citizens of the United States in their *property* rights against unwarranted encroachments by the States. We need do no more than refer to the exhaustive opinion of Mr. Justice Brewer in *Cotting* v. *Godard*, 183 U. S. 79. Will the Court be less solicitous to protect a citizen's liberty than his property? "Next in degree to the right of per-"sonal liberty is that of enjoying private property without "undue interference or molestation," says Mr. Justice Harlan in *Chicaga, B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, quoting from Broom Const. Law, 228. The English law has at times been much criticised for placing a higher value on mere property than on life or liberty; our Court puts the matter on the right basis.

Now, regarding mere property rights this Court has refused to follow State adjudications on the rules of Equity, on the rules of the Law Merchant, on the prin-

ciples of Admiralty Law. *Bucher* v. *Cheshire R. R.*, 125 U. S. 555; *Swift* v. *Tyson*, 16 Pet. 1; and numerous other cases.

In *Boyce* v. *Tabb*, 18 Wall. 546, it was held that contracts relating to slaves, valid when made, are nevertheless valid though afterwards held void by the Supreme Court of the State as against public policy. The Court say in effect that the provisions of the Judiciary Act do not require Federal Courts to follow State decisions on such questions. Those provisions do not apply to questions of "a general nature, not based on a local statute "or usage, nor on any rule of law affecting titles to land, "nor any principle which had become a settled rule of "property." The State decisions on the excepted matters are highly persuasive, but not conclusive.

In *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555, Mr. Justice Miller comments on and defines § 721 of the Judiciary Act, and states there is nothing in the act which requires Federal Courts to follow State decisions on questions of equity or admiralty. The learned Justice cites *Swift* v. *Tyson*, 16 Pet. 1, which makes the same ruling as to the general principles of commercial law. The classes of cases in which he says the Federal Courts are bound by State decisions include all interpretations of State constitutions and statutes; decisions, whether founded on statutes or not, which have laid down rules of property; decisions establishing rules of evidence; and the common law, in actions at law. As to this last, the Court say, difficulties arise.

"It may be said generally that wherever the decisions "of the State courts relate to some law of a local char- "acter which may have become established by those

"courts, or has always been a part of the law of the State, "that the decisions upon the subject are usually conclu- "sive, and always entitled to the highest respect of the "Federal courts."

There is nothing in the language of sec. 721 of the Judiciary Act which holds the Federal Courts bound to follow State decisions on general principles of the common law of crimes; and there are assertions of principles by this Court in various cases which go far to show that it will not be bound by such decisions.

In *Swift* v. *Tyson*, 16 Pet. 1, the Court makes the well-known distinction between statutory law and the law as announced by the courts; the latter being only the evidence of what the laws are, and if found defective or ill-founded, may be reëxamined and a different rule announced. Considering then sec. 34 (now § 721) of the Judiciary Act, the Court say that the true interpretation of that statute is that it embraces only the statutory laws of the given State, the interpretations thereof by its courts, and to rights and titles to immovables. To these enumerated classes the term "State laws strictly local" is applied; as to all others the reasoning of the Court leads to the conclusion that the Federal Courts are not at all bound by State adjudications. It would seem to follow necessarily from this that if there is any such thing in Anglo-Saxon law as a general principle of criminal law, this Court is not bound by the decisions thereon of the State tribunals. There are many decisions of this Court holding that while there is no such thing, strictly speaking, as a common law of the United States, yet when an Act of the Congress uses a term of common law origin, the courts of the United States will have recourse to the common law for a definition of such term.

If there be a question of murder on the high seas, the courts of the United States look at once to the common law for the ingredients of murder, and they find there that there must be intent, malice prepense, deliberation. If the question be the negotiability of a bill of exchange, recourse is had to the law merchant for the requisites of negotiability. Is the one a more general principle than the other? If the State Court should hold a transfer of a bill of exchange in good faith, for value and without notice before maturity did not pass title, this Court would decline to follow the ruling. Is it any more bound in the absence of a State statute to follow an erroneous ruling on a general principle of criminal law?

The point here insisted on is that the indictment in this case charges a criminal conspiracy; but there is no State statute defining that offense, and hence the State Courts of necessity must go to the common law for the definition, and the indictment must contain all the essential ingredients of the crime, as there defined. Admitting for the moment that a conspiracy to cheat and defraud by false pretenses is a common law crime, then the State must allege that crime in terms of the common law. By all the authorities, either in the indictment or the particulars furnished the defense when demanded in apt time, the prosecution must set out the false pretenses, and they must be either false weights or false measures or false tokens, or else no crime whatever is charged. The State in this instance has failed to charge a common law crime in terms of the common law; and hence it has charged no crime at all. If it has charged no crime at all, then this prosecution is not due process of law.

(b) It is a denial of the fundamental right of the citi-

zen to be informed of the nature of the charge against him.

But a far stronger reason exists why this Court should, on this branch of the case, discharge the prisoners.

In failing to charge any crime in the indictment and in incarcerating defendants below on a sentence based on such defective indictment, the State has invaded the fundamental right of the citizens of the United States to be informed of the accusation against them, and has, in addition, deprived them of their right not to be a second time put in jeopardy for the same offense.

Under the vague allegation of "false pretenses" in this indictment, how could defendants prepare their defense? A hundred different changes might be rung on the false pretenses. And, more important still, how could defendants plead former conviction. Suppose a new indictment to be framed on a conspiracy to cheat Garrett by selling him a salted mine; or by selling him bars of copper as and for gold bars, the conviction in this case would be no bar to either. Is it not a fundamental right of every American citizen that he shall not twice be tried for the same offense? And this irrespective of State or Federal Constitutions or Statutes? Does not this proposition come fairly within the ruling of this Court in *Loan Ass'n.* v. *Topeka,* 20 Wall., 655, 662? No court has gone further than this Court in upholding the rule of pleading which requires an indictment to fully state the crime, so that defendant may be apprised of the accusation against him, and be ready to meet a second charge for the same offense. *U. S.* v. *Cruikshank,* 92 U. S. 542; *U. S.* v. *Mills,* 7 Pet., 138. In *U. S.* v. *Cook,* 17 Wall., 168, this Court say: "Every ingredient of which the offense is "composed must be accurately and clearly alleged."

Is the State absolutely omnipotent in criminal matters within its boundaries? If so, it is a strange omission in our Federal Constitution. Property rights are carefully guarded from arbitrary action by the State, but the lives and liberty of citizens of the United States are absolutely at its mercy. If this be true then a State may lodge in its chief executive the power to issue *lettres de cachet;* it may re-establish the ordeal, the wager of battle, amputation of members, the old punishment for high treason, the *peine forte et dure;* the only limitation being that all alike must be subject to the new laws.

We submit this cannot be the law; and we are not without cogent authority and reason on the subject.

In *Brown* v. *New Jersey,* 175 U. S., 172, it was held that a trial of a defendant in a criminal action in a state court by a struck jury is not a violation of XIV. Arndt. and is due process of law.

"The state has full control over the procedure in its "courts, both in civil and criminal cases, subject only to "the qualification that such procedure must not work a "denial of fundamental rights or conflict with specific and "applicable provisions of the Federal Constitution." By Mr. Justice Brewer, citing *ex parte* Reggel, 114 U. S., 642; *Iowa C. R. Co.* v. *Iowa,* 160 U. S., 389; *Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 258.

The Court here makes two classes of rights, namely: "fundamental rights" and rights secured by the express language of the Federal Constitution. In other cases similar language is used. *In re* Kemmler, 136 U. S., 436, the Court speaks of "those fundamental principles of "liberty and justice which lie at the base of all our civil "and political institutions." This statement is made in

a criminal cause and in reference to the liberty of a citizen. The language is taken directly from the leading case of *Hurtado* v. *State*, 110 U. S., 516. In this last case, the Court quotes with approval the celebrated opinion of the late Mr. Justice Miller in *Loan Assn.* v *Topeka*, 20 Wall., 655, 662. There are certain rights, says that learned jurist, "in every free government beyond the "control of the state. A government which recognized "no such rights, which held the lives, the liberty and the "property of its citizens subject at all times to the abso-"lute disposition and unlimited control of even the most "democratic depository of power, is after all a despot-"ism."

In *Holden* v. *Hardy*, 169 U. S., 366, it is said: "This "Court has never attempted to define with precision the "words 'due process of law,' nor is it necessary to do so "in this case. It is sufficient to say that there are certain "immutable principles of justice, which inhere in the very "idea of free government, which no member of the Union "may disregard, as that no man shall be condemned in "his person or property without due notice, and an op-"portunity of being heard in his defense."

What are these "immutable rights," these "fundamental rights," which lie at the base of all our * * * institutions?" Unquestionably this Court will not attempt any precise definition, but will properly leave each case to be decided on its special facts. But it is submitted that one of those rights is the right of every man to be told of the nature of the charge against him. Can a state deprive a man of this right? If so, then as pointed out above, a state can punish a man as often as it pleases for the same offense. There is no escape logically from

this conclusion. It will not do to answer this by saying the state rule bears on all alike; for we invoke a different principle; we invoke the principle that every man, woman child in this broad Union, citizen, denizen or alien, has the indefeasible right to be informed of the accusation against him or her, and to be protected from further prosecution for the same offense by the plea of former conviction or former acquittal.

Perhaps these rights are included within the "priv-"ileges and immunities of citizens of the United States." No precise definition of this phrase has been attempted, but in numerous decisions this Court has enumerated certain of these "privileges," while in other cases it has held certain claimed rights not to be within the meaning of the provision.

In *Maxwell* v. *Dow*, 176 U. S., 581, it was held that the rights secured by the first eight amendments to the Federal Constitution were not necessarily privileges and immunities of citizens of the United States, as such; and hence these rights are not carried bodily into the 14th Amendment and thus made effective as against the several states. As to what these privileges and immunities consist in, the opinion quotes very largely from the Slaughterhouse Cases, 16 Wall., 36, and from the opinion of Mr. Justice Washington in *Corfield* v. *Coryell* (4 Wash., C. C., 371; S. C. Fed. Cas. No. 3230). Without attempting to define all these "privileges" Mr. Justice Miller enumerates the following: Free ingress and egress to and from any state; all privileges of trade and commerce allowed the citizens of any state; all privileges that are *fundamental*, which belong of right to the citizens of all free governments, and which have at all times

been enjoyed by the citizens of the several states, including protection by the government, the enjoyment of life and liberty with the right to acquire and possess property and to pursue and obtain happiness and safety, subject to state provisions for the general good; to go to the seat of government and assert claims or transact business; to seek the protection of the government; to share its offices; free access to seaports and to its various offices throughout the country; access to the courts of the several states; protection of the government on the high seas or within the jurisdiction of foreign governments; to assemble peaceably with others to petition for redress of grievances; the right to the writ of habeas corpus; to use navigable waters of the United States within state limits; rights of citizens secured by treaty; to become a citizen of any state; rights secured by Amendments XIII. and XV.; to bring actions in state courts; to keep and bear arms to the extent necessary to preserve to the federal government its resource to maintain the public security.

Per contra, the following have been held not to be such privileges and immunities; to practice law in state courts; women suffrage; trial by jury in state courts in suits at common law; the rights reserved by the Fifth and Sixth Amendments, since these are not rights peculiar to citizens of the United States, but are secured to all persons irrespective of citizenship; the property right to take fish in the waters of a state; indictment by grand jury or trial by jury, as at common law, in criminal cases; the prohibition of cruel and unusual punishments; for the state to adopt rules of judicature different from the course of common law, provided those rules are uniform as to classes (not purely arbitrary) in the state.

Maxwell v. *Dow, supra; Bradwell* v. *Illinois*, 16 Wall., 130; *Minor* v. *Happersett*, 21 Wall., 162; *Cole* v. *Cunningham*, 133 U. S., 107; *Blake* v. *McClung*, 172 U. S., 239; *U. S.* v. *Cruikshank*, 92 U. S., 542; *Re* Kemmler, 136 U. S., 436; *Walker* v. *Sauvinet*, 92 U. S., 90; *Doe ex dem. Murray* v. *Hoboken, etc.*, 18 How., 280; *Presser* v. *Illinois*, 116 U. S., 252; *O'Neil* v. *Vermont*, 144 U. S., 323; *Thorington* v. *Montgomery*, 147 U. S., 490; *Missouri* v. *Lewis*, 101 U. S., 22.

Again we meet the expression "privileges that are fun-"damental, and which have at all times been enjoyed by "the citizens of the several states, including * * * "the enjoyment of life and liberty * * * subject to "state provisions for the general good." Thus on the one hand as protected by the XIV. Amendment we have certain constitutional and certain additional rights which are fundamental, and these are protected; on the other, we see certain forms of procedure and certain limitations on the Federal Government which are not the peculiar privileges of its citizens, and these are not protected.

By pursuing this other route, we have arrived at the same destination. Is the right to be informed of the nature of the accusation against one "fundamental"? In this right is inextricably bound up that other right that no person shall be twice tried for the same offense. Is not this a fundamental right? These defendants were denied such rights by the Courts of North Carolina. Will this Court uphold that denial?

An argument "on the inconvenience" may be urged against this Court entertaining this case; and it may be said that such action would open wide the doors of Federal Courts to all defendants in state prosecutions. Not

so. So unique a case as this may not arise again in half a century. The criminal law in practically all the states is reduced to a code. The few common law offenses are almost entirely classed as misdemeanors punishable with short jail sentences or small fines. The chance of another case presenting the questions here invoved is practically nil. But even were it not so, inconvenience cannot prevail against the law.

All of which is respectfully submitted.

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NO. 218. 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

J. L. HOWARD, ALIAS FRANK THOMPSON,
A. L. DALY, ALIAS GONEZ BONO, AND
H. D. HAWLEY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

Brief and Argument for Plaintiffs in Error

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NO. 313.

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Brief and Argument for Plaintiffs in Error

STATEMENT.

There are two cases before the Court involving these appellants and plaintiffs in error, numbered 312 and 313, respectively. The former comes up from the Circuit Court of the United States for the Eastern District of North Carolina by way of an appeal from an order of that Court remanding the petitioners and dismissing their petition for a writ of *habeas corpus;* the other from the Supreme Court of North Carolina on a writ of error.

Inasmuch as the questions involved in each case are cognate, and because of the poverty of the appellants, we have made but one brief and argument for both.

The appellants and plaintiffs in error were arrested, tried, convicted and sentenced at a Superior Court of

Guilford county, North Carolina, June Term, 1901, for a bare, unexecuted conspiracy to obtain money by false pretenses from one Paul Garrett, by the supposed means of what is vulgarly known as the "gold brick game." Briefly, the facts are that Howard appeared in the office of one Paul Garrett, a liquor merchant of Weldon, North Carolina, clad in the garb of a miner and affecting ignorance of letters and of ordinary affairs. He told Garrett that he had once, in Arizona, a partner named Andrew Garrett, who, some years before, had left him and gone east, and there died. Andrew had a brother, Peter, and Howard supposed P. Garrett (Paul) might be that brother. That before Peter left him, they had agreed, if either made a "strike," the other should share in it. That Howard had found a rich mine in Arizona, in which an Indian (Bono) had an interest. That they had mined it in a rough way and had taken out certain bars of bullion, worth about $36,000. The Indian had these at a camp near Greensboro; and they intended going East to sell the gold at the mint; to perfect their mining claim; and to buy machinery. Incidentally Howard had stopped over in the hope of finding the brother of his old partner, whom they wished to engage with them to aid in executing the above objects and also to keep their accounts, neither Howard nor the Indian being capable of so doing. After some negotiations Howard agreed with Garrett to engage him in this preliminary work at $25 per day, $10 as earnest money being paid down by Howard and accepted by Garrett; and for his future services to give Garrett the third interest in the mine reserved for the brother of Howard's deceased partner. An arrangement was then made for Garrett on the second day thereafter to meet Howard

at Greensboro, and go to the Indian's camp, there to inspect the bars of gold, take borings and have them tested, and to get the consent of the Indian to the agreement with Garrett. As Howard passed from Garrett's office, the latter called his clerk's attention to Howard, saying: He was "a genuine gold brick man." Nevertheless Garrett kept the appointment at Greensboro, but in the meantime sent one Mims, paying his expenses, to the authorities at Greensboro and arranged to trap Howard and the other plotters. On the way to the Indian's camp, Howard became alarmed and started to go back, but was urged on by Garrett and deceived by a lie of Garrett (312 Trans., 76). Arriving at the camp Garrett asked Howard to tell the Indian that he, Garrett, was the brother of Andrew Garrett, Howard's partner, another lie. Certain brass bars were then produced by Daley, who was disguised as an Indian, and at once the officers closed in and arrested the parties. A visiting card, bearing the name of Hawley, was taken from Howard, *after* the arrest. Returning to Greensboro, Hawley was arrested at the hotel, but not in the presence of Howard or Daley, and was asked if the card was his, but denied it (312 Tr., 93). A satchel or case was found in Hawley's room, the ownership of which he denied, containing certain assayer's blanks (312 Tr., 94), also bronzing liquid, commercial ratings of Bradstreet, and a letter addressed to "Harry," telling of his appointment to the Philadelphia mint. A hotel claim check was found on Daley's person; and, after the arrest, the authorities took the trunk from the hotel by attachment. This trunk contained (312 Tr., 102 et seq.) some maps, commercial reports, bronzing liquid, some other items, and twelve small packages of genuine gold borings. To the

introduction of the card in evidence, also the contents of case and trunk, also certain declarations of one or more of the parties after arrest, made out of the presence of others, objections were duly interposed, overruled, exceptions, and the points duly saved, assigned as error and presented to the Supreme Court.

Garrett thought there was a $20,000 reward in Virginia for these parties, and before the arrest he wrote concerning it to the Attorney General of that state (312 Tr., 88). After the arrest, Garrett went to his attorneys and caused a civil suit to be filed against the three parties arrested for $2,000 for an alleged breach of the contract to pay him $25 a day and the third interest in the mine. This suit was filed at 2 o'clock in the morning, and an attachment in aid sued out (312 Tr., 86, 87), verified under oath by Garrett, setting out that the defendants were indebted to him in that amount for the breach of the above contract (312 Tr., 86). Under this writ everything the prisoners possessed, except the clothes on their backs, was then taken (312 Tr., 103). On the criminal trial when the panel was in the box, and afterwards in the charge to the jury, the judge specially singled Garrett out for commendation; and of course defendants objected (312 Tr., 64, 119. See also dissenting opinion of Douglas, J., 313 Tr., 27). On the verdict of guilty, for this bare, unexecuted conspiracy, two were sentenced to ten years in the penitentiary, the third to seven years.

The Federal questions raised are that defendants below were denied the equal protection of the laws of North Carolina, they being citizens of the United States; that their trial, conviction and sentence were not due process of law; that their privileges and immunities as such citi-

zens were abridged, all in violation of the amendment to the Constitution of the United States.

The manner in which these questions were raised appears in the "Specification of Errors" following.

SPECIFICATION OF ERRORS.

A

The petition for the writ of *habeas corpus* sets out that Howard and Daley are citizens of Illinois, Hawley of New York, and all citizens of the United States; and that they are unlawfully detained by the warden of the State Penitentiary.

That they were indicted for a certain conspiracy, setting forth the first count.

That the acts so charged do not constitute any offense under the law, statutory or otherwise, of North Carolina.

That they moved in apt time, in the State trial court, to quash said indictment on the grounds that it was not due process of law; the trial denied them the equal protection of the laws; and that their privileges and immunities as citizens of the United States were thereby abridged; all in violation of the Federal Constitution. Which said motion was overruled.

That they then moved for a bill of particulars, in apt time. Which motion was also overruled.

That in its charge to the jury the Court refused, though requested, to charge on the presumption of innocence.

That they were convicted, and thereupon moved in

arrest, setting out the same Constitutional grounds. Which motion was denied, and petitioners sentenced, two of them to ten years, the other to seven years, in the penitentiary.

That they appealed to the Supreme Court of the State, where they urged the above Constitutional matters, but the Court affirmed the judgment.

That said indictment in truth charges no offense, that the alleged acts constitute no crime under the laws of North Carolina, and the State courts are hence without jurisdiction to try, sentence or punish your petitioners.

That the punishment is greater and different in kind from any ever heretofore imposed in said State for a like charge, and hence void because a denial of the equal protection of the laws in violation of XIV Amendment.

That said trial, conviction and punishment are hence each of them void as contrary to the said Constitutional rights repeating them.

This petition was duly signed and verified by petitioners, and the writ was ordered issued.

To this the Warden made return stating that he held petitioners by virtue of certain proceedings in the courts of North Carolina, setting them out, including the indictment, and decision and mandate of the Supreme Court.

That the Federal courts have no jurisdiction in the premises on *habeas corpus*, the remedy of petitioners being by way of writ of error.

That the punishment was not excessive, for the judge who sentenced them was in possession of the facts that Daly and Howard were charged with carrying concealed

weapons, and that they were charged with conspiracy in South Carolina and Iowa.

That the decision of the Supreme Court of North Carolina is final.

Signed and verified.

To this return an answer was filed elaborating the allegations of the petition and reiterating them, with the addition of the statute referring to the road law, hereinafter fully set out, which requires petitioners to have been sentenced to the road and forbids their sentence to the penitentiary, which latter is alleged to be in violation of the Constitution of the United States.

They deny they have cheated persons in other States, and if the Court took into consideration unfounded rumors and gossip *dehors* the record and in consequence thereof increased their sentence, such action was a denial to them of the equal protection of the laws and abridged their rights and privileges, in violation of the XIV Amendment.

Deny that the Warden's return is sufficient.

Signed and verified.

There was no evidence taken on the issues framed; but, on motion by the State, petitioners were remanded; and this appeal prosecuted.

In the writ of error the points are raised as stated in the petition as above set out.

APPELLANTS AND PLAINTIFFS IN ERROR WERE DENIED THE EQUAL PROTECTION OF THE LAWS, *because:*

1. The sentence was excessive and barbarous, such as had never before in the history of the state been inflicted in a conspiracy case; even when the criminal object of

the combination had been fully consummated. For example: It is five times greater than given for an executed conspiracy against the virtue of a young unmarried woman, the carrying out of which was practically a rape.

This question is raised in the petition for *habeas corpus,* in the traverse of the warden's return to the writ, and in the assignment of errors in this court (312 Trans. 5, 29, 53, 54).

2. The Supreme Court of North Carolina has decided that a sentence greatly exceeding in length of imprisonment that theretofore given for like offenses in that state is "cruel and unusual" within the meaning of the inhibitory provision of the State Constitution. If cruel and unusual, it must hence be a discrimination against appellants, and violative of the equal protective clause.

The point is raised in the petition, in the traverse to the return, and is assigned as error (312 Trans. 5, 6, 29, 54, par. 3rd).

3. The Statute of North Carolina provides that in all penitentiary sentences the convicted parties shall not be sent to the state's prison, but the court shall in its judgment order that they be put to work upon the highroads, provided the county in which the trial was had has a road law, except in certain specified cases. These defendants were convicted in Guilford County, which had then such a road law, and they were not in the excepted cases; yet they are now undergoing the harsher punishment in the penitentiary.

This point is raised in the petition, the traverse to the warden's return, and assigned as error in this Court (312 Trans. 6, 27, 54).

4. Howard and Hawley were discriminated against in this, that the law of the State requires all conspirators in the same combination to be punished alike; yet the two named received ten years and Daly only seven.

This point is saved in the petition, not traversed by the return, and assigned as error in this Court. (312 Trans. 4, 53.)

5. The State admits that the trial court increased the sentence because of gossip he had heard *dehors* the record. (312 Tr. 15, 31.)

B.

THE TRIAL, CONVICTION AND SENTENCE WERE NOT DUE PROCESS OF LAW, *because*:

1. The combination for which defendants below were tried was not an offense in North Carolina either by statute or at the common law. They were sentenced, therefore, in the absence of all law; and their punishment is as illegal as if inflicted by mob violence.

This point is raised in the petition, the traverse to the return, and assigned here as error (312 Trans. 3, 25, 54, Assgt. Sixth), and also in the writ of error in the motion to quash the indictment, in error assigned in the State Supreme Court, and error assigned in this Court. (312 Trans. 63, par. 7th, 123, par. 7th, No. 313, 6 Assgt. 1, pars. a, b, c, d.)

2. There was no statute of the State authorizing the infliction of this heavy sentence, and the action of the majority of the Supreme Court of the State was hence not the exercise of a judicial function, but was legislation, pure and simple.

This point is saved in the petition, not traversed by the return, and is assigned here as error, (312 Trans. 3, 54, par "fifth"); and in the writ of error, in the assignments of error in the State Supreme Court and in this Court. (312 Trans. 123, 313, Trans. 6, par. 4th.)

3. Such a punishment for such an offense has never heretofore been inflicted by the Courts of this country, Federal or State. It is hence arbitrary, capricious and void.

The point is raised as in A, 1, *supra.*

4. The sentence is so heavy and so out of all proportion to the offense as to transcend the "limits of those "fundamental principles which lie at the base of all our "civil and political institutions." It is an "arbitrary "deprivation" of liberty; it ignores the basic principle that all punishment should be proportioned to the crime; it shocks the conscience by its severity; it points to the conclusion that it was conceived in passion, and born of sectional hatred; and if persisted in, it would lead to retaliation between the States of our Union.

The point is saved as in the paragraph next above.

5. The sentence is opposed to the genius of our institutions as manifested by the legislation and decisions in the various States. The modern sentiment is opposed to judge-made crimes. When tolerated at all, small punishments only are permitted.

6. The trial Court refused, though requested, to charge on the presumption of innocence.

This point is saved in the petition, traverse to the return and in the assignment of errors in this Court. (312 Trans. 3 and 4. 26, 53, par. "third.")

7. The indictment is not due process of law because it charges no offense whatever.

BRIEF AND ARGUMENT.

When this case was called in the Superior Court of Guilford County, the defendants had no reason to believe that their trial would not be fair, or that the Court would violate any of the rights secured them by the Fourteenth Amendment to the Constitution of the United States. However much their expectations may have been disappointed in the conduct of the proceedings and in the sentence by the *nisi prius* judge; still they believed, and their counsel with them, that in the Supreme Court of the State their rights and the law would be vindicated. In the opinion of counsel, the errors committed on the trial were so many, so gross and so palpable that there was no thought of any other result than reversal. In part their opinion was sustained by the minority of the higher tribunal. Counsel had the right to rely on that Court to protect their clients in their constitutional rights, State and Federal. So relying, Federal questions were presented only perfunctorily *as* Federal questions by way of exceptions. They were urged in argument before the Court, as appears by the allegation in the petition, which stands uncontradicted. (312 Tr. 4 and 5.) But though they were not raised (with one exception) *eo nomine* as Federal, yet the errors relied on in this court were fully presented and argued in that tribunal. In the motion to quash the indictment it was alleged, among other matters, that the indictment charged no crime, either at common law or by statute, and that it was defective in being so vague as not to apprise defendants of the charge

against them. Exception was duly taken to the refusal to grant a bill of particulars; to the refusal to charge on the presumption of innocence; and to the excessive sentence. On appeal error was assigned in the State Supreme Court, among others, on the points just mentioned. In these errors are included most of the violations of the Fourteenth Amendment complained of in the petition for the writ of *habeas corpus*. It is manifest from a reading of the opinion of the Court that, no matter how the Federal questions might have been raised, nor how strenuously insisted on, the decision would have been the same.

We are aware of the general rule of this Court that ordinarily such questions should be presented in apt time to the State tribunals and in apt language; the reason for that rule being, as we understand it, that on *habeas corpus* the prisoner must be discharged altogether, if the petition be sustained, while on a writ of error, the plaintiff in error, in certain contingencies, may be sent back for a re-sentence. We submit, however, that if the contentions here presented be sound, the prisoners must be discharged, whether their case be here by *habeas corpus* or writ of error. This court has more than once permitted the *habeas corpus* proceedings and the writ of error to proceed concurrently. Ex parte Frederich, 149 U. S., 70; *Whitten* v. *Tomlinson,* 160 U. S. 242; *Markuson* v. *Boucher,* 175 U. S. 186.

Believing as we do that a monstrous injustice has been done, we appeal to this Court to rectify it, confident that "not the weight of a judge's finger shall rest" upon these men except by strict command of the law. We have nothing to say in commendation of them. That

they intended to get money through Garrett it were foolish to deny; but no crime has been legally charged against them and no crime has been proved against them. Rights secured by statutes and by Constitution were refused them. The blackest criminal has as strong a claim to the due and orderly administration of the law as the blessed martyr. No otherwise can a free country exist.

In this case attention is respectfully called to the various opinions rendered by the Supreme Court of the State. The Court consisted of five judges and there were four opinions. The majority opinion was rendered by Judge Clark, with whom concurred Faircloth and Montgomery, J. J., if the opinion of the latter be really a concurrence. "He thinks" that some of the remarks of the trial judge were "inappropriate and indiscreet"; "the "language of the statute may not have been violated, *but "its spirit certainly was"* (italics ours). See 312 Tr. 20. The main dissenting opinion is by Judge Douglas, concurred in as to result by Furches, C. J. This opinion is a vigorous dissent, and numerous fatal errors are pointed out, so great and so numerous, says this judge, that their "combination * * * renders it morally impossible "that they (the defendants) should have had such a trial "as they are entitled to by the 'law of the land.'"

An examination of the pleadings in No. 312 will disclose that the petition for the writ of *habeas corpus* raises practically all the questions to be submitted to this Court (312 Tr. 1 et seq.). In the return to the writ, the warden of the penitentiary traverses only one allegation of the petition, namely the charge that the punishment is greater than ever awarded in that State for a like offense (312 Tr. 14), saying that "the punishment is "not unusual, and is, as he advised, fully authorized by

"the laws of the state," etc. As to the manner of impanelling the jury, grand and petit, he says, while admitting the facts, that custom was followed. (312 Tr. 12, 13.) He justifies the heavy sentence by stating that the trial judge was in possession of various rumors, *dehors* the record as to the criminal history of defendants. (312 Tr. 14, 15.) Thus it appears that the petition remains substantially not denied. Under the rulings of this court, all allegations in the petition for the writ not traversed are admitted, if petition be verified as in this case. (See order of court 312, Tr. 7.) *Whitten* v. *Tomlinson,* 160 U. S. 231; *Kohl* v. *Lehlback,* 160 U. S. 293.

In the answer of petitioners to the return, the allegations of the petition are elaborated, and some new matter responsive to the return is added. No attempt was made by the warden to frame an issue of fact or to introduce evidence; and on motion, the prisoners were remanded. This motion was the equivalent of a demurrer to the answer of petitioners, and, on elementary principles of pleading admitted all facts well pleaded. See Church on *Habeas Corpus,* 2nd Ed. §§ 159, 160, 161 and cases cited.

The admitted facts, therefore, are the following: 1. That the trial court deliberately took into consideration gossip and rumors *dehors* the record, and increased the sentence in consequence thereof; 2. That the motion to quash the indictment and the motion for a bill of particulars were each denied; 3. That the prayer for an instruction to the jury on the presumption of innocence was denied; 4. That the Court, in effect, charged the jury that defendants were guilty; 5. That in argument

before the State Supreme Court the foregoing points were urged upon the Court as being in violation of the Fourteenth Amendment to the Constitution of the United States; 6. That the sentence was greater than ever inflicted for a like offense in the State; 7. That under the road law and the statute of the State, the *duty* of the Court was to sentence defendants to work on the roads of Guilford County, and not to the penitentiary.

These points, except 2, were not noticed in the opinion of the Supreme Court of North Carolina, and hence are taken to have been decided adversely to plaintiff in error, and against the Federal protection invoked.

With respect to the inhibitions of the Fourteenth Amendment, it makes no difference by what branch or instrumentality of the State government they are violated, the Federal Courts will protect the citizen of the United States in any event. *Chicago, B. & Q. R. R.* v *Chicago,* 166 U. S. 226; *Scott* v. *McNeal,* 154 U. S. 34.

The judgment being in violation of the Constitution is utterly void.

A.

THE DEFENDANTS BELOW WERE DENIED THE EQUAL PROTECTION OF THE LAWS.

1. *The sentence is more severe than ever inflicted in that State for a like offense.*

Pretermitting for the present the provision of the North Carolina Constitution relating to cruel and unusual punishments, we rest for the moment on the proposition that the sentence is more severe than ever inflicted in

that State for a like offense. It is equal to the maximum denounced by the Legislature of North Carolina for a conspiracy to overthrow by force the government or to levy war against the state!

In *State* v. *Powell,* 121 N. Car., 635, the alleged conpiracy was to procure a seventeen year old girl by false pretenses to leave her home for the purpose of prostituting her. The scheme was successful, and the girl was actually debauched. For this unspeakable crime the sole defendant tried was sentenced to *two years* on the roads. It appears from the report that the co-conspirator was Lulu Powell, presumably the wife of Marion Powell, who alone was tried. The crime was thus one of "peculiar atrocity"; the woman entering into the combination made it easier to lure the trusting girl to her ruin.

In *State* v. *Wilson,* 121 N. Car., 650, the scheme was the same, the false pretenses being a mock marriage, invalid by the laws of the State. This, too, was carried out, and the women were prostituted. The report shows the sentence only as to Wilson. The judgment recites that he had been previously indicted for shooting a man in the arm, breaking it, "without justification or provo-"cation"; that he had been indicted for carrying concealed weapons, pleading guilty to both charges and judgment suspended (it is intimated through malfeasance of the State's solicitor); that he was "a notorious violator of "the law and openly defies the law and its process" (p. 653). Under these circumstance, comparing the punishment inflicted on these appellants for their bare, unexecuted conspiracy, one would suppose that hanging, drawing and quartering would be the least Wilson could expect, and that he might congratulate himself to have

escaped the *"peine forte et dure."* However, he got *two years on the road.* From the recitals in the judgment above set out, the sentences of the other defendants must have been much lighter.

What a commentary are these two cases on the morals of a community which can complacently view such trivial punishments for such hideous crimes. We cannot forbear quoting in this connection from our brief in the Supreme Court of North Carolina:

"Shall it be said of this great State, among whose "founders were Monk, and Clarenden, and Shaftsbury, "whose first legislator was John Locke, whose early set- "tlers resisted, under Culpeper, the enforcement of the "odious navigation laws, anticipating New England a "full century in a revolt against tyranny, * * * "shall it be said of her, I say, that she has come to this: "that she is five times more solicitous to protect the paltry "dollars of the wine merchant Garrett than to guard the "virtue of her women! Or are we to infer that she has "one measure of punishment for her own citizens, though "they be 'notorious violators of the law and openly defy " 'the law and its process,' and another and harsher meas- "ure for the strangers within her gates?"

State v. *Jackson*, 82 N. Car., 565, was a conspiracy to charge a woman with "infanticide and to cause her "to be arrested, prosecuted and punished therefor." The defendants were sentenced to ten, eight and five years in State's prison, respectively, though as the Court say, p. 569, the crime was "one of peculiar atrocity in the "object aimed at and in the means contemplated and at- "tempted to accomplish that object." Judgment was reversed, because the *punishment was in excess of that per-*

mitted by the law as then construed by the court; and also because the law did not authorize different terms for different defendants. It should be noted that this case, besides being one of "peculiar atrocity," was also strictly within the Edwardian conspiracy statutes, hereafter to be examined, and contemplated the perversion of justice by perjury.

State v. *Mallett,* 125 N. Car., 718, was a conspiracy to defraud. Defendants were sentenced to two years in the county jail. (See *Mallett* v. *North Carolina,* 181 U. S. 589.)

Comparing this sentence with the punishments prescribed by the Legislature for the three statutory conspiracies known to the laws of North Carolina, we find the maximum for a conspiracy to abduct a child is fifteen years, R. C. § 974; the maximum for a conspiracy to embezzle funds of a railroad by its employees, and a conspiracy to levy war against the State is ten years. Laws 1870-1, ch. 103, § 2; Rev. Code, § 1107.

This Court has repeatedly said that the Fourteenth Amendment prohibits a "different or higher punishment "to be imposed on one than is imposed on all for like "offenses." *Re* Kemmler, 136 U. S., 436; *Caldwell* v. *Texas,* 137 U. S., 692; *Connolly* v. *Union & C. Co.,* 184 U. S., 540.

2. *The sentence is "cruel and unusual," within the meaning of the State Constitution; and hence discriminates against defendants below.*

In *State* v. *Driver,* 78 N. Car., 423, it was held that a sentence of five years in the county jail and a recognizance of $500.00 to keep the peace thereafter for five years for wife beating was "cruel and unusual," and the

case was reversed. The principle of this case is that where a sentence greatly exceeds the punishment inflicted usually in that State in like cases it becomes cruel and unusual and hence unconstitutional. This is a different meaning of the phrase from the construction put upon the same language in our Federal Constitution; but the ruling is exceedingly apposite to the case at bar. If the sentence is "cruel and unusual," it certainly comes within the inhibition of this Court as being a "different" and "higher punishment" than is usually imposed for like offenses *In re* Kemmler, *supra.*

It is worth while to quote one extract from the opinion of the Court in the Driver case to show just the attitude assumed in this connection. After stating the case and the constitutional provision, together with certain statutes, the Court refers to 3 Story on Const., § 1896, and to the fine of £30,000 imposed on the Duke of Devonshire by King's Bench for his assault on Culpeper (a fine dictated by the malice of James II.) and its review, after the Revolution of 1688 by the House of Lords; Judge Reade says: "Thus it appears, both by prece-"dent and by the reason of the thing, and by express "constitutional provision, that there is a limit of the power "of the judge to punish, even when it is expressly left "to his discretion. What the precise limit is cannot be "prescribed. The Constitution does not fix it, precedents "do not fix it, and we cannot fix it, and it ought "not to be fixed. It ought to be left to the judge "who inflicts it under the circumstances of each case, "and it ought not to be abused, and it has not been abused "(grossly) in a century, and probably will not be in a "century to come, and it ought not to be interfered with, "except in a case like the present, where the abuse is

"palpable. And when that is the case, then the sleeping "power of the Constitution must be waked up to pro- "tect the oppressed citizen. The power is there, not so "much to draw a fine line close up to which the judges "may come, but as a 'warning' to keep them clear away "from it."

3. *The penitentiary sentence was a denial of the equal protection of the laws.*

The statute of North Carolina provides: "Sec. 1. "That when any county has made provision for the "working of convicts upon the public roads, or when "any number of counties have jointly made provision for "working convicts upon the public roads, it shall be law- "ful for, and the duty of the judge holding Court in such "counties, to sentence to imprisonment and hard labor on "the public roads for such terms as are now prescribed "by law for their imprisonment in the county jails or "in the state prison, the following classes of convicts: "First, all persons convicted of offenses the punishment "whereof would otherwise be wholly or in part impris- "onment in the common jail; second, all persons con- "victed of crimes the punishment whereof would other- "wise wholly or in part be imprisonment in the peniten- "tiary for a term not exceeding ten years."

"Sec. 4. That in all cases where the judge presiding "shall be satisfied that there is good reason to fear that "an attempt to release or to injure any person convicted "of any of the offenses mentioned in section one of this "act, class second, it shall be lawful for the judge to sen- "tence such convicts to imprisonment in the penitentiary, "as is now provided by law: *Provided,* That no person "who has been convicted and sentenced on a charge of

"murder, manslaughter, rape, attempt to commit rape, "or arson, shall be assigned under this act." Law N. Car. 1887, p. 630. The act shall not apply to certain counties named, not mentioning Guilford County. The latter County adopted the road act Sept. 4, 1894. (312 Trans. 48, 49.)

On the plainest principles of criminal jurisprudence it was the duty of the trial court to sentence the defendants below to work on the roads, or else to recite in its judgment the reasons why he made the judgment a term in the penitentiary. The judgment should have contained a recital bringing it within the provisions of Sec. 4 of the act; otherwise the act itself might well be a dead letter.

4. *By reason of the unequal sentence, Howard and Hawley were denied the equal protection of the laws.*

The two named received a sentence of ten years in the penitentiary, while Daley received seven years. There is absolutely no difference in the guilt of the various defendants, if they were guilty at all. The evidence shows that Howard was the spokesman, Hawley was the assayer (his connection was of the very slightest), and Daley played the Indian. If these men were engaged in a conspiracy to cheat and defraud Garrett, then all are equally guilty and there are no degrees of culpability; but the trial judge capriciously gave a lighter sentence to one than to the others. This was in violation of the rule laid down in *State* v. *Jackson*, 82 N. Car., 565, and was one of the errors on which that case was reversed. In the opinion by Judge Clark in the case at bar no mention is made of this point, though it was urged in our brief and the Jackson case cited. It was probably one of very many exceptions which the learned judge, with-

out mentioning specifically, contented himself with saying they were "without merit," (Tr. 313, p. 18); an easy, if somewhat unsatisfactory, method of answering the argument of counsel.

5. *The Judge allowed the tittle-tattle floating round the Court-House, and dehors the record, to influence his judicial discretion, and to cause him to increase the punishment.*

This stands admitted by the State. Not admitted by failure to deny, but actually and solemnly alleged affirmatively in order to justify this oppressive judgment!

They were wanted in Iowa! They were wanted in South Carolina! And some busy Mr. Wheeler goes to the jail and recognizes them as having swindled him! (312 Tr., p. 15.) And where and to whom did he impart this discovery? Not under the sanction of an oath, nor under the penalty of cross-examination. Did he "sit at the ear" of the judge, "squat like a toad," and pour his venom in there? There was no hint or whisper, at the trial, of these various other conspiracies; there is nothing in the record about them; and they were simply so many stabs in the back, with no chance to defend. Did some assassin whisper in the judge's ear in the Powell and Wilson cases, perchance, that the victims there were only harlots, and hence two years or less would be punishment enough for their violation? It is not easy to write temperately about such a proceeding.

There is no law in North Carolina increasing the punishment of habitual criminals; and if there were it could not apply to extra-territorial crimes. There is no law in that State authorizing the Court to hear evidence of bad character to enhance the sentence; and if there

were, no such evidence was heard on the trial and defendants given an opportunity to meet it. It remains that the State expressly alleges that these heavy sentences were imposed because of information given to the Court *in secret* and in the absence of the defendants. It is true that the return alleges that "it appeared to the Court" that requisitions had issued and that a Mr. Wheeler identified defendants, etc. Counsel cannot mean that such facts appeared to the Court at the trial, *for they did not* in truth, and the record shows they did not. Defendants were wholly ignorant that anything of the kind was going on. It was simply an instance of the Dreyfus secret ***dossier***.

Finally, the inquiry is pertinent, What has North Carolina to do with punishing crimes committed in Iowa? Our impression is that Iowa would say she is capable of attending to her own criminals. And how monstrous, too, to enhance the punishment in this case because these men had committed offenses in other States. Would it avail them in mitigation to plead that fact hereafter in South Carolina?

It is insisted that this is a clear violation of the XIV Amendment in that it denied defendants the equal protection of the laws, and was not due process of law. The points are raised in the answer to the return (312 Tr. 31).

If such a thing can be tolerated to enable the Court to assess the punishment, why may it not be done to determine guilt or innocence? And would the latter be due process of law?

Jeffreys was known in many cases to get the pleasure of the King before forcing a conviction!

B.

THE TRIAL, CONVICTION AND SENTENCE WERE NOT DUE PROCESS OF LAW; because,

1. *The alleged offense was not a crime either at common law or by statute of North Carolina.*

It was conceded by the majority opinion that no statute of the State covered this offense; and, in order to convict, recourse must be had to the common law. The statute of North Carolina relating to the adoption of the common law is as follows: "All such parts of the com-"mon law as were heretofore in force and use within this "State, or so much of the common law as is not destruc-"tive of, or repugnant to, or inconsistent with, the free-"dom and independence of this State and the form of "government therein established, and which has not been "otherwise provided for in whole or in part, not abro-"gated, repealed or become obsolete, are hereby declared "to be in full force within this State." 1 Code N. C., 1883, § 641.

The proposition now urged upon this Court is that a combination or agreement to cheat and defraud was not a punishable conspiracy at common law. The statement can with all safety be made broader. There was no such offense as conspiracy known to the common law. The crime originated in certain statutes of Edward I., was amplified by statutory law in the time of Edward III., and subsequent reigns; but never had any existence, save by statute, in the English law, until well on in the Stewart dynasty, when the judges began to legislate in that behalf. Until that time, conspiracy comprehended only combinations to commit champerty, em-

bracery and maintenance; combinations falsely to appeal men of felony; and combinations among wool merchants to control the price of the staple. There were also statutes, mainly in Elizabeth's time, denouncing combinations among laborers.

The deduction from this proposition is that there being no law of conspiracy, statutory or common, in North Carolina covering this offense, defendants were simply tried by a mob and not by due process of law.

We have endeavored to show at great length in subdivision 7, *infra*, that the Federal Courts are not bound to follow State adjudications on any general principle of the criminal law known to the common law. If our argument in that behalf is valid and sustained by the precedents cited and by right reason, then it follows that this Court does not have to take the definition of the majority of the North Carolina Court in this case of a common law conspiracy, but is free to determine for itself what the term includes and whether or not there was such an offense at common law. If it should determine that the acts charged in this indictment were no offense at common law, the prisoners should be discharged.

(a) *The English Common Law of Conspiracy.*

The legal concept that it is a crime for two or more to combine to commit some act, though the object of the agreement is never carried out, or as the old books say, "tho' nothing be put in ure," originated, we believe, in the Anglo-Saxon Jurisprudence after the Conquest. It is not found in the ancient laws of Normandy, where one would naturally seek its origin. It is not in the Grecian nor Roman systems; nor in the Brehon laws; nor in the

early Germanic nor Salic laws; nor in any system of jurisprudence in ancient or medieval times, so far as we have been able, after diligent search, to ascertain.

Beginning with the Norman Conquest, we find no trace of it in England in the period covered by Dr. Bigelow's admirable collection of cases, "Placita Anglo-Normannica," from A. D. 1066 to A. D. 1195; nor in *Leges Henrici, circ.* 1118. There is no hint of it in the Select Pleas of the Crown, Selden Soc. A. D. 1200 to A. D. 1225; nor in the 2,000 cases in Bracton's Note Book, from A. D. 1200, to *circa* A. D. 1240 (the case, No. 479, indexed under "conspiracy," in Prof. Maitland's Ed. is not a conspiracy); nor in Glanville, who wrote between 1187 and 1189; nor in Bracton's treatise, "The Crown and Flower of English Medieval Jurisprudence" (1 Pollock & M. Hist. Eng. Law, 206) written about 1250 to 1258; nor yet in Britton nor Fleta, both about 1290.

It is a strong presumption that no such offense existed at common law, that, in all the materials now at hand covering the period, of more than two centuries after the Conquest, we find no single suggestion of it until we come to the statutes hereinafter examined. The presumption becomes well nigh indisputable when we see numerous cases touching accessories in the same and earlier periods. "Anglo-Saxon law knows the slayer by rede, as well as the slayer by deed." 2 Pollock & M. 509.

In Bracton's time, he who advised the killing was a slayer himself; but Bracton also gives another maxim, that unless the party has *acted* on the advice or command there is no crime. "*Ubi factum nullum, ibi forcia nulla.*" Bracton, ff. 142, 139. The rule in Bracton's time in cases where a party of men under a leader committed a

crime, such as murder, robbery or the like, was for the leader to be tried first, and, if acquitted, his associates went free. These latter were called his *"alia"*; the title "conspirators" is never used. See illustrations in 1 Select P. C. (Seld. Soc.), cases 4, 9, 76, 84, 155, 164, 197.

It is hard to reconcile this common law maxim with the doctrine of 27 Ass., 34, 44, where the conspirators were punished, though nothing was put in execution; unless indeed the law of conspiracy was something which came after Bracton's time, by way of a statute; as, for example, 33 Edw. I., in which case the whole matter becomes luminous.

A word as to the situation of that period, disclosed by our histories, will, we think, strengthen the argument.

After Edward I. had become accustomed to his throne, he undertook numerous judicial reforms. It was not until then that the great courts are becoming definitely separate; and from that time dates the sharp struggle between the King's courts and the local courts for jurisdiction. The barons resented the ever increasing interference with their own tribunals. "This is my warrant, my masters," said Earl De Warrenne, throwing down his sword in the face of the King's Bench. When Edward proved too strong for open resistance, fraud, chicanery, maintenance were used to evade or to bring into contempt the new courts. At this time also the ordeal was passing, and the jury had arrived. For a time its struggle for existence was precarious. The new process by indictment was just devised, and crime was becoming to be recognized as an offense against the King, and not merely a private wrong. The situation was critical. We can now to some extent appreciate why Edward and his im-

mediate successors passed statute after statute defining and punishing maintenance, champerty and conspiracy, and providing civil remedies therefor. They were necessary to prevent the judicial reforms from being swept away. We can see, too, from the historical standpoint why it is an anachronism to say that the offenses named were, before that time, known to the common law. How could a jury be embraced before there were any juries? Were a man's compurgators, conspirators? How could there be maintenance in a trial by witnesses? In truth these offenses grew out of the trial by jury, and beyond doubt the writ of conspiracy was invented to be used against persons abusing the new process of indictment. See 3 Stubbs, Const. Hist. 575 *et seq.;* 1 Pollock & M. ch. VII.; 2 id., 539; Thayer, Predim. Treat. on Ev., ch. 1; 2 Social England, 32; 2 Reeves Hist. Eng. Law. 126, 457.

The statutory enactments clearly reflect the situation as we know it historically.

By 3 Edw. I., ch. 25 (West. 1, 1275) champerty by the King's officers was prohibited; and by ch. 28 of the same act any "clerk of any Justicer or sheriff" was forbidden to maintain "quarrels of matters" depending "in "the King's Court."

In West. 2, c. 49 (1284, 13 Ed. I.) champerty and simony by the chancellor, treasurer, justices, any of the King's Council, clerks of chancery and of the exchequer, and justice or other officer, or any of the King's house, clerk or lay, were prohibited; and offenders "punished "at the King's pleasure, as well he that purchaseth as he "that doth sell." This, Coke said, was merely an extension of West. 1, c. 25 (*supra*), because it was doubted

whether the word "King's officers" (*nul ministre le roy*) would include persons of such eminence as those named in West. 2, without special mention.

By Cap. 12 West. 2 (13 Ed. I., 1284) it was recited that inasmuch as many persons maliciously procure false appeals to be made by appellors who are pecuniarily irresponsible, it is therefore provided that if the appellee be acquitted in any case, and the appellor be found unable to respond in damages, then the justices shall enquire by whose abetment or malice the appeal was commenced: and if it be found by "the same inquest that any man "is abettor through malice," he shall be distrained and mulcted at suit of the acquitted party and imprisoned.

In the twentieth year of his reign (1292) a statute entitled "Statutum de Conspiratoribus" prohibited champerty and maintenance and provided that such as were "attainted of such emprises" should be imprisoned for three years and fined at the King's pleasure. A civil writ was also provided and the form thereof given. This writ ran to any who would "complain himself of con- "spirators, inventors and maintainors of false quarrels "and brokers thereof and brokers of debates"; while the form of the writ given provided that anyone who would give surety for prosecution "of a plea of *conspiracy* and "trespass according" "to our ordinance" should have the writ.

In c. 10 of *Articuli super Chartas* in the twenty-eighth year of this reign (1300) it was enacted that, in addition to the writ out of Chancery theretofore provided for plaintiffs against "conspirators, false informers, and evil "procurers of dozens, assises, inquests and juries," such writ should run from either court and from the Justices

of the Assises on circuit. This statute, so far as conspirators were concerned, merely facilitated the getting of the civil writ, and gave jurisdiction thereof to King's Bench and the justices in eyre in addition to the chancery.

By the next chapter (28 Ed. I., c. 11) the offense of maintenance was extended to embrace all persons whatsoever, whether officers of the King or not, excepting, of course, attorneys and next friends.

In 33 Edw. I., A. D. 1305, we find the famous "Ordi-"nance concerning Conspirators," as follows: "Con-"spirators be they that do confeder or bind themselves "by oath, covenant or other alliance, (1) that every of "them shall aid and (bear) the other falsely and mali-"ciously to indite (or cause to indite) or (2) falsely "to move or maintain pleas; (3) and also such as cause "children within age to appeal men of felony whereby "they are imprisoned and sore grieved; (4) and such as "retain men in the country with liveries or fees for to "maintain their malicious enterprises; and this extendeth "as well to the takers as to the givers; (5) and stewards "and bailiffs of great lords, which by their seignory, "office or power undertake (to bear or maintain quar-"rels, pleas or debates that concern other parties) than "such as" touch the estate of their lords or themselves. "This ordinance and final definition of conspirators was "made and accorded by the King and his Council in "his parliament in the thirty-third year of his reign."

"Champertors be they that move pleas and suits, or "cause to be moved, either by their own procurement, or "by others, and sue them at their proper costs, for to have "part of the land in variance or part of the gains."

By 1 Edw. 3, § 2, c. 14 (1327) it is provided that "because the King desireth that common right be admin-"istered to all persons, he commandeth and defendeth" that no persons, high or low, "shall take upon them to "maintain quarrels * * * to the let and disturb-"ance of the common law."

By 4 Edw. 3, c. 11 (1330) it is recited that divers people and great men "have made alliances, confederacies "and conspiracies to maintain parties, pleas and quarrels," hence it is provided that either bench and the justices of assises shall take inquests at suit of the King or of parties and determine of "such maintainers, bearers and con-"spirators" and champetors.

By 18 Edw. 3 st. 1 (1344) process of exigent is given against absconding "conspirators, confederators and "maintainors of false quarrels."

20 Edw. 3, c. 4 (1346) is in affirmance of sts. 1 and 4 preceding, with some additional details.

By 27 Edw. 3, st. 1, c. 1 (1353) it is provided among other things that "maintainors" shall be put out of the King's protection, their lands and goods forfeit and their bodies taken and imprisoned.

By 27 Edw. 3, st. 2, c. 25 (1354) it is forbidden for merchants to make "conspiracies, confederacies, &c., and "ill device" for disturbance, impeachment, &c., of the staples on pain of death. This is the only statute in the long line relating to any other matter of conspiracy except to pervert justice.

By 1 Ric. 2, c. 4 (1377) none "shall henceforth take "nor sustain any quarrel by maintenance * * * upon a grievous pain" prescribed by the act.

By 7 Ric. 2, c. 14 (1383) it is recited that "grievous "complaint is made of maintainers of quarrels and cham- "petors" and therefore statutes 1 Edw. 3, st. 2, c. 14; 4 Edw. 3, c. 11; and 1 Ric. 2, c. 4, are confirmed.

32 Hen. 8, c. 9 (1540) makes elaborate provisions against maintenance, champerty and embracery, reaffirming all statutes made "concerning maintenance, cham- "perty, and embracery or any of them."

An examination of the foregoing statutes shows that for a period of considerably more than one hundred years the two great Edwards and Richard II. were repeatedly legislating against the crimes of champerty, embracery, maintenance and conspiracy; and that in their minds the four offenses were but different phases of the same general crime, namely the crime of perverting justice. It is difficult at this late date to realize the intensity of the struggle between the King and his Courts on the one side, and the feudal lords on the other, from the accession of Edward in 1272 to that of Henry VIII. in 1509; yet without such realization we cannot fully understand the legislation and judicial decisions of that period on the topic now under discussion. It was the struggle between law and order on the one side, and semi-anarchy on the other; between the jurisdiction of the King's Courts, and the lawlessness of the barons; between the centralization of power in the King and his parliament, and the fiercely claimed independence of the feudal lords. These crimes struck at the very vitals of the growing nation. Either English Courts were to become supreme and England a homogeneous world power, or she was to split up into little principalities. The issue remained doubtful for five centuries after the Conquest, and it was not until

the strong hand of the Tudor dynasty took the helm that the Ship of State sailed out into the broad waters of Empire.

The first reported case on our topic in English law occurred in 1351, and was error sued out of King's Bench to reverse a judgment given in Circuit on a presentment of conspiracy. The charge was that a man and his son had conspired to imprison another until he should pay a fine. After passing on a technical point, the Court says: "And moreover because the principal matter of "the conspiracy alleged is not conspiracy, but rather dam- "age and oppression of the people. Wherefore we reverse "and annul the judgment." Y. B. 24 Edw. 3, p. 75.

In 1354, in the Articles of Inquest, we find: "Note: "that two were indicted of confederacy, each to maintain "the other, whether their matter was true or false, and "notwithstanding that nothing was put in ure, the parties "were held to answer, because this thing is forbidden by "the law." (*Defendu en ley*, i. e., criminal.) 27 Ass., 44. See, also, almost precisely the same language in 27 Ass., 34. This is the first recorded case, so far as extant documents go, in which a conspiracy was criminally punished.

Next in order of time is the case of 1365 in which one sought to get a civil writ against several for having conspired to forge a deed of release and to put the same in evidence, which they did, whereby the petitioner for the writ had lost his case; and Thorp said: "And do "you pray that you have a writ of conspiracy on the "ground of an evidence? You shall not (have it)." Y. B. 39 Ed. 3, p. 13 a.

Be it observed that the civil action was much broader

than the criminal, as shown by the Statutes 20 and 28. Edw. 1. It included a remedy of damages against those who falsely caused one to be indicted of a trespass. (See 3 Ass., 13.) And hence, if no civil action lay for conspiracy, *a fortiori,* no indictment would lie; though unfortunately many courts have cited cases of civil action as precedents in the criminal cases. To be a little more specific, we mean by this that there were more *subjects* enumerated by the statutes for which the writ lay than there were on which indictments could be predicted. Thus, as stated, an action lay for a conspiracy to commit a trespass, in its medieval sense (quite different from its modern meaning), yet it was not indictable. On the other hand, sometimes, prior to 1611, an indictment might properly be brought when the writ would not lie; but this, as we shall show hereafter, was because the conspiracy had not been completed, and hence the plaintiff had not suffered any damages, in the medieval sense.

In 19 R. 2 F. Briefe 926 (1395) several brought a writ of conspiracy against J. and others. The writ contained the allegations "confederated" and "conspired." The writ was held bad, because *two* could not join as plaintiffs in a writ of conspiracy, the injury being several. "Rik. (Rickhill, Justice, spelled Rickel, Rikel and "Rickhill.) The imprisonment of one cannot be the im-"prisonment of the other, by which you take nothing by "your writ," etc. Gascoigne (afterwards immortalized by Shakespeare in Henry IV.) as counsel, made the point of improper joinder of plaintiffs, on which the case turned. In another place in the book the case is stated: "Two were indicted, &c., and they brought a writ of "conspiracy. The writ was they confederated and con-"spired, also, &c. *Wad.* A man will have a writ of

"conspiracy although they (i. e., the conspirators) do "nothing but confederate together, and he will recover "damages. And they can be indicted of this also. But "for this that their grievance is several and they brought "their writ in common, it was abated." The case is reported in Bellewe, Cas. temp. Ric. 11, at pp. 80 and 108.

Next we come to the case of *Sydenham* v. *Keilway* (1574), which is reported as follows: "Popham, Ch. J., "cited a case to be resolved by all the Justices, Anno. "16 Eliz. *Sydenham* v. *Keilway*, that where two conspire "to indite one falsely, and the party is not indicted be- "cause the jury had not sufficient evidence, but returned "an *'Ignoramus'* upon the bill, no (writ of) conspiracy "lies, because he never was indicted nor acquitted; yet "he may be indicted upon conspiracy at the common law "for this false conspiracy and misdemeanor, which is "punishable at the common law." Cro. Jac. 7 (Case 9).

Ameridith's Case, Moore 562 (1599) was an information in Star Chamber for a conspiracy, under the second paragraph of 33 Edw. 1, by certain of Ameridith's tenants, who agreed among themselves to contribute to suits brought and to be brought respecting certain freeholds and copyholds of inheritance. And because they had no common interest in the lands so held "they were fined "for the combination, and maintenance and the taking of "obligations, one from the other." Otherwise would it have been if "by custom in which they all participated in "common" their interest had been mutual.

The case of Lord Grey of Groby, Moore, 738 (1607) in Star Chamber was one in which the lord complained of his tenants because they joined in the expense of a

petition to the King on the Customs of the Manor. The Court took the distinction between the case in which all tenants were interested in the same custom; and the case where the question was one of tenure. In the first they might share the expenses and not be guilty of the offense of maintenance; but not in the second; because the tenure of one is not the tenure of all. And because the tenants claimed a custom that all the copyhold tenures descended for life to the eldest son of the deceased copyholder, or to his daughter, in default of a son; the Court, by Popham, held that it was "an illegal combination."

This review exhausts, we believe, the cases on conspiracy from the Conquest to the Poulterers' case (1611).*

From these cases a distinction is to be noted as having been taken by King's Bench, which was perfectly plain to the Courts until the eighteenth century is reached, but which has been greatly misconceived since.

The language of all the statutes requires the object of the conspiracy to have been completed; or, if not the precise language, yet the necessary implication; and this was the construction adhered to by the Courts in cases of conspiracy, properly so called. That is to say, before several could be appealed or indicted of a conspiracy to indict or appeal a man, the latter must have been acquitted *legitimo modo*. But in 27 Ass. 34, 44, a new doctrine was announced; namely, that nothing need be "put in ure" as to these conspiracies, for the agreement to be

*We say we believe the review to be exhaustive; but those who are familiar with the Year Books well know how defective are their indices. On these, however, we have necessarily relied; except as to the Book of Assises. This we have examined page by page. There are in it some very interesting conspiracy cases deciding various questions: whether the commissioned Justice or the indictors could be conspirators; the right to try one conspirator in the absence of the others, and the like. But none of these touch the matter under discussion, namely: What is the essence of the offense? They are all, however, either for maintenance or for falsely indicting for felonies.

indictable; and they took this distinction; a conspiracy is divided into two parts; (a) the agreement falsely and maliciously to &c., (b) the execution of that agreement, as by an appeal or an indictment of the victim of the conspiracy. After having proceeded as far as (b) the conspirators were safe from an indictment for a "conspiracy" (note the word) unless and until the victim were found "not guilty" on the merits. It would not suffice for him to save himself on a point of law or even a successful plea of self-defense in an appeal of murder; he must be *legitimo modo* acquitted. But suppose the parties had agreed to maintain each other, true or false; here surely must be an offense within the mischief of the Statute. And so the Judges made the division above indicated; and said this false "confederacy" (a) was a crime; or, as we would say now, the completion of it was but the "overt act" of the "confederacy," and the "false confederacy," without this overt act, was punishable at *Common Law*. They did not for one moment conceive that *every* "false confederacy" was punishable at Common Law, but only those confederacies which were the agreements precedent to the specified *Statutory conspiracies*.

The distinction was well understood by Coke, and is especially insisted on by him in his comments on and summary of the Poulterers' Case. Holt, C. J., observes the difference in the Best case (1691) *infra;* and it was not until well on in the 18th Century that the distinction was ignored; then text writers and some courts seized upon the word confederacy, dislocated it from its connection, and tortured it into the meaning that "confederacy," that is "combination," that is "conspiracy," was a common law offense. Thus by an easy transition they

concluded that *all* combinations were denounced as crimes by the Common Law.

The proposition is so important that we shall try to restate it. By various statutes passed chiefly by Edw. 1 certain specific combinations were made criminal, and designated by the Ordinance 33 Edw. 1 as "conspiracies." But by the letter of, or by necessary implication from, the previous statutes relating to the same offenses, before conspirators could be punished for their crime, the crime itself must have been completed by the full carrying out of the objects of the combination; that is, the suit must have been maintained and lost by the conspirators, or the victim of the appeal or indictment must have been tried and acquitted *legitimo modo* of the false charge. Then, and not until then, under the statutes, were the conspirators liable criminally. Now this did not adequately meet the evil, and so the Judges of Edw. 3 carved out of those statutes a lesser offense, namely, a "confederacy;" and they punished the combination, if it were discovered in time, before it had fully ripened into the conspiracy. But these punishable "confederacies" were only the combinations denounced by 33 Edw. 1; those and none others. (Adding of course the wool merchants' conspiracy, 27 E. 3, s. 2, c. 25.)

The text writers before Coke's time give no hint of conspiracies outside of the statutes.

Staundford, who was a Common Pleas Judge in Elizabeth's reign, published or wrote his Pleas of the Crown in the latter half of the 16th Century.

He gives quite a disquisition on Conspiracy, mostly taken up with the civil writ. He has not the faintest notion that there is any common law offense outside of

the Edwardian Statutes; but asserts the writ lay at common law as well on an acquittal on an *appeal*, as on acquittal on an *indictment;* and this notwithstanding West. 2, c. 12. This is a very different thing from saying that conspiracy is a common law crime; for as soon as the Statute makes a combination to do an act a crime, then one who is injured subsequently by that combination would, probably, at common law, have his civil remedy, on the principle of *"ubi jus, ibi remedium."* At any rate Staundford sticks to the Statutory offense.

The earliest text book mentioning conspiracy in its expanded sense is Termes de la Ley, which contains, in the editions subsequent to the Poulterers' case, a condensed statement of that case and Coke's glosses thereon; but the edition of 1579 contains only a copy of 33 Edw. 1, some references to statutes on Conspiracy of Edw. 3. Hen. 5, 6 and 7, and a short account of the villainous judgment. In the edition of 1629, the matter of the Poulterers' case is indicated as new since the previous edition.

Rolle's Abridgment refers only to 33 Edw. 1 and to the case of 27 Ass. 34. Fitzhebert, a Judge of Common Pleas, is to the same effect in his *Natura Brevium* written in 1519.

In all save one of the precedents contained in the *Register Brevium* the allegations relate to agreements to cause the plaintiffs to be arrested or indicted on some false criminal charge; the exception being a conspiracy to assert title in a dwelling belonging to M., by which M. had been brought before the court and despoiled and impoverished by the litigation; a case of maintenance, within 33 Edw. 1. This last precedent concludes in stating the conspiracy, as do the others in which the

formal conclusion is given, to have been *"against the form of the Statute"* or King's Ordinance. Reg. Brev. "De Conspiratione," p. 134, Ed. of 1687. This strikes us as practically decisive of the question.

Thus we find in the four centuries from 1200 to 1611 an unbroken, uncontradicted line of authorities; of forms of writs; of opinions of text writers (save only the "Fables of the Mirror") agreeing on the proposition that 33 Edw. 1 was indeed the "final definition of Conspirators" and that beyond its content conspiracy did not exist.

Blackstone did not have the slightest notion of endorsing the modern interpretation of Hawkins' text, *infra*. In Bk. 4, p. 136, he defines conspiracy as an agreement to indict an innocent falsely of a felony, who is accordingly indicted and acquitted. This goes away back to Edw. 1 and to the Book of Assises of Edw. 3. No mention is made of Hawkins, though the latter wrote sixty years before Blackstone. Neither does Judge Blackstone indulge in any theories about common law conspiracies; but then, as we all know, Blackstone was totally lacking in imagination and he actually tried to talk about the law as it really existed, not as doctrinaires thought it ought to be.

Hawkins published his Pleas of the Crown in 1717 and in Vol. 1, Ch. 72, he states that "there can be no doubt but "(sic) that all confederacies whatsoever wrongfully to "prejudice a third person are highly criminal at common "law"; a radical departure indeed from settled doctrine, if we are to consider "confederacies" as equivalent to "conspiracies"; but intelligible and proper if Hawkins was keeping in mind the distinction made by the early

judges between the two crimes. If he meant the former then he is absolutely unsupported by a single case cited by him. He cites 27 Ass., 34, 44; Grey of Groby's case; Poulterers' case; the Bastardy cases (Timberly and the others); Starling's case; Best's case; and *Saville* v. *Roberts,* all of which are herein elsewhere stated, save *Saville* v. *Roberts,* reported in Holt, 150; 1 Ld. Raym. 374; 5 Mod., 394, 405; 1 Salk., 13; and Carth., 416 (1699). This was case in the nature of a writ of conspiracy for falsely conspiring to indict Roberts for a riot, whereof he was acquitted. Plaintiff recovered damages below, and judgment was affirmed in King's Bench. Lord Ch. J. Holt drew the distinction between *case* in the nature of conspiracy and the ancient writ of conspiracy, saying the latter would lie only where the conspiracy had been to indict of a treason or felony. Hawkins' later editors add the cases of Cope, Tailors of Cambridge and Edwards.

If, however, Hawkins had in his mind the old distinction between "confederacy" and "conspiracy," his statement of the law is well enough; for by it he could have meant only to say that all "confederacies" wrongfully to indict or cause to indict, falsely to maintain pleas, &c., as defined in 33 Edw. 1, are highly criminal at common law. These "confederacies" are truly "wrongfully to "prejudice a third person,"but the "prejudice" is only that prejudice which is defined in the Edwardian Statutes. So Thorp understood it in 1354; so Coke in 1611; and so, we believe, did Hawkins in 1717. Either that, or Hawkins is open to the criticism of stating a proposition not only unsupported by his authorities, but in flat contradiction of them and baldly untrue. Modern enthusiasts on common law conspiracy may take either horn.

Having misunderstood the ancient distinction between confederacy and conspiracy, the advocates of the common law theory seek to strengthen their position by appealing to the great name and reputation of Lord Coke. Coke certainly has said, more than once, that champerty, maintenance and conspiracy were offenses at common law independent of Statute, and these statements have usually been deemed conclusive of the law; so that in this century a lawyer attacking them for the first time comes dangerously near the line of ridicule. He may quote Lord Campbell's statement as to Coke's ignorance of and contempt for science and literature; he may quote Sir James Fitzjames Stephen's characterization of Coke's disorderly mentality, his inability to analyze the commonest words, and his inaccuracy with respect to his authorities; and he may point out with Prof. Maitland (the greatest living authority on medieval English law) Coke's credulity with respect to alleged ancient law writers; and still the almost irresistable weight of that great name will crush the venturesome critic. 1 Campb. Lives C. J. 333; 2 Stephen Hist. Eng. Cr. Law, 205, 206; Introd. to Mirror, 7 Seld. Soc., p. 10.

This much only can we say: We have before us all the material accessible to him and very much more; we have the advantage of three centuries of evolution of the human mind, with all that that implies in the way of freedom from superstition, analytical habits of thought and an immensely broadened intellectual horizon. It rests with each man to think for himself.

But note: Coke nowhere states the offense in broader terms than 33 Edw. 1, as more fully shown below.

We have asserted that prior to Edw. 1 the legal con-

cept of a crime of combination, without any further act, existed in no other system of jurisprudence. It did not get into the English system, from the Roman Law through Azo to Bracton; nor did it arrive with William from Normandy; no student from Bologna, Paris, Pisa, Padua or Salamanca brought it back to England; nor did it come down from the Anglo-Saxons. Coke did not know it as a common law doctrine from the cases, for it is not in the books now extant and in print, containing many more precedents in the formative period of the common law than he had access to. This we submit is a strong argument against its common law origin.

If it was already a known offense at common law in Edward's reign why did that law giver legislate so much and so often on the subject? That was not an era of making acts of the legislature "while you wait." An ordinance was a thing of moment, a thing thought about; and yet on these topics this "English Justinian" caused to be enacted eight separate statutes; more than on any other subject in the whole range of his legislation. If all this (and much more as some will have it) existed in the breasts of his Justices, why trouble himself and the new-born parliament with the matter?

Coke cites the Mirror and the Mirror only, 2 Inst. 383-4, 562. As well might a lawyer nowadays cite the Comic Blackstone. It would certainly raise no presumption that his proposition is true; whatever else it might bring about. In the note on page 383 of 2 Inst. will be found the origin of Lord Coke's error as to the common law nature of conspiracy. He says that he has read that Henry I. mitigated the pre-existing severity of the common law as to conspiracy, and comments for half a page on the matter. He cites the Mirror, de Hom., c. 4. The

passage referred to will be found in the Sel. Soc. Ed. of that book at p. 136; and there the author of the Mirror tells of this law of Henry I. which Coke cites, but which no one else in modern times has ever seen. Now if there is one point on which the author of the Mirror is strong, it is history and ancient legislation. True, his historical statements and his alleged legislative acts were mostly never heard of by any other person, and do not exist in any printed book or known manuscript now extant; but what of that? Has he not the same right to compose histories as Geoffrey of Monmouth or Baron Munchausen? He tells how Alfred the Great hanged forty-four of his judges in one single year for their false judgments. He even gives the names of the judges and the name of each case in which the false judgment was rendered (p. 166). Some of these names are Scandinavian, and some Norman, but that is a mere detail. The book was written between 1285 and 1290, and we know of the great judicial scandal of 1289. Horn, the supposed author of the Mirror, seemed to be a crank on the subject of "unjust judges," and fills a large part of his treatise with denunciations of them. It appears also that the trial by jury was in full blast in Alfred's time. The Mirror says so, pp. 166 *et seq*. There is also some wonderful news about the laws of Leuthfred and Thurmod (pp. 107, 152), and jury trials in their time, whenever that might have been. Nobody else ever heard of those law givers; but that also is a detail, perhaps thrown in, as the playwright says "to "add verisimilitude to an otherwise bald and uninteresting "narrative."

The Mirror has in it a good deal of literal transcript from Bracton; and here, it is needless to say, its author speaks law. He also tells us some "common law." For

example: A landlord cannot distrain his tenant's movables for rent in arrear; leases for more than forty years are void; rent reserved, in excess of one-fourth the annual value of the land, is illegal. The Mirror, 7 Seld. Soc. 129, 75.

We have devoted some space to the Mirror, for as an authority, except when otherwise corroborated, it is worthless; and its author simply a romancer with a hobby. If my Lord Coke was deceived by a plain liar, then it is neither fair or lawyer-like to use his name to bolster up the fraud.

But although Coke insists on the common law origin of conspiracy, champerty and maintenance, he was as far from subscribing to the modern doctrine of "common law "conspiracy" as was William de Thorp. He says a conspiracy is an agreement falsely to appeal a man of a felony (3 Inst. 143) and he does not go one single step further. Neither do Rolle nor Fitzherbert nor Staundford. They leave that to later text writers and judges.

But if conspiracy was a crime independent of statute, here is a curious thing. In 13 Ed. 1 c. 12 we find a complaint that certain men procure straw men to indict, and then, if there is an acquittal the "abettors" go free. And so the King will have the abettors punished. And how? Not by the villainous judgment, but by "imprisonment "and restitution of damages." This is strange. If there were a common law of conspiracy, one would say there was no need of this statute; it would only have been necessary to appeal the first appellor and his abettor of a conspiracy, and on conviction hale them to prison, raze their houses, dig up their trees, deprive them of their free law and their children of their inheritance. 27 Ass.,

59; 47 Ass., 11, the "villianous judgment." That is a comprehensive enough punishment surely. And, moreover, why provide that the acquitted appellee should have his damages, if the writ of conspiracy already existed? The more rational view is that when the evil was invented, Edward met it with a statute; as it grew, so he strove the more to abate it. The Stat. 13 Edw. 1 being inadequate he passed the 20th; that still being faulty he enacted the 28th and then the 33rd.

And yet again, every student of English history knows how jealously the staples, especially wool, were guarded, how much they were legislated about, how valuable to Henry III. and Edward I. for purposes of revenue; yet we read nothing about conspiracies to engross the staples, nor to export them, nor to injure them until 27 E. 3 when the statute was passed punishing conspiracies and confederacies relating to them; and at once thereafter in the Articles of Inquest in 27 Ass. 44; we find the justices ordered to enquire concerning merchants who conspire to affect the price of wool. Yet had conspiracy been a common law offense would we not rather expect to find some mention of it, as touching the staple, before that time?

Coke says one proof of its common law origin is that no punishment was denounced by 33 E. 1, and yet we find cases in which the villianous judgment has been suffered, this being a common law punishment. 3 Inst. 143. But that was the ordinary judgment of attaint following every felony unless otherwise provided. It was so in Glanville's time one hundred years before the Ordinance of Conspirators. Glanv. bk. 7, ch. 17.

These arguments, it is true, are largely negative; but

what shall be said of the two express decisions that it is no conspiracy to agree to imprison a man till he shall pay a fine, nor to agree to forge a deed and put the same in evidence? The former implies an assault and battery and extortion of money; the other, while at that time forgery of a private seal or deed was a minor offense, necessarily implies the perversion of justice by indirect means. Y. B. 24 E. 3, 75; Y. B. 39 E. 3, 13a. While forgery of the King's seal was treason, yet common forgery is punished rather incidentally in course of civil actions by imprisonment. Bract. N. B. case 934. Actions for fraud by forgery seem to be founded on 1 Hen. 5, c. 3; see 2 Pollock & M. 540. It is not until 5 Eliz., c. 14 (1563) that the offense is made a felony.

Fairly considered these decisions mean that it was not a conspiracy at common law to combine to commit a crime, even though the agreement, in the language of Hawkins, may be "wrongfully to prejudice a third per-"son."

Lastly, the Statute of 33 Edward I. says concerning itself that it is the "final definition" of conspirators. The original version is *"Ista ordinatio et finalis deffinicio "consp. &c."*

The rule with respect to statutes declaratory of the common law is that if they are made in the "affirmative "without any negative, expressed or implied" they do "not take away the common law." 2 Inst. 200.

The modern notion with many is that outside of the Edwardian Statutes there is a great mass of common law conspiracy which may be drawn on as the tastes or prejudices of courts may suggest. But the statute expressly provides that its definition is "final," or in the original,

"finalis." Finalis is a post-classical adjective, the primary meaning of which has reference to "boundaries"; only secondarily does it connote an ultimate point of time. See Papin, Dig., 10, 1, 11. Such too is the meaning of the English "final." Had Edward meant final in point of time, he should properly have used "last" or "ultimate" which imply succession, while "final" respects the completion of the object. Crabb's Eng. Syn. tit. "last."

Can it be said that there is no "negative implied" in this expression? If it is "final," if its boundaries are fixed, if the object (the definition) is completed, how can it be said that there is anything left beyond and outside of the statute touching the same subject matter? Certainly, Coke, to whom these moderns appeal, never for a moment imagined a conspiracy outside of the Statutes. True, he speaks in Poulterer's case of conspiracies among wool merchants in support of his argument that the *confederacy* is punishable without any execution, but he was well aware of the statute of 27 E. 3, s. 2, c. 25, making it a crime for merchants to conspire concerning wool and the staples; for he sets it out and comments at large on it in 3 Inst. 95, 195.

He says: "Conspiracie is a consultation and agree-"ment between two or more to appeale or indict an inno-"cent falsely, &c."; and he sums up his understanding of the Poulterer's case thus: *"Nota,* reader, these *confeder-"acies,* punishable by law, before they are executed, ought "to have four incidents: 1. It ought to be declared by "some manner of *prosecution,* as in this case it was, either "by making of bonds or promises one to the other. 2. It "ought to be malicious, as for unjust revenge, &c. 3. It "ought to be *false* against an *innocent.* 4. It ought to "be out of *court* voluntarily" (italics ours). Certainly

all this does not get very far away from Edward's definition. Yet he is constantly appealed to as authority for the proposition that an agreement may be a criminal conspiracy, though neither end nor means be criminal.

We come now to celebrated Poulterer's case, decided in Star Chamber in 1611. 9 Rep., 55.

This is made to father all the modern judge made law of conspiracy, and hence it is worth while to state it fully.

One Stone had incurred the enmity of certain poulterers in London; and accordingly, for revenge, they conspired to indict him of a capital felony. They caused him to be arrested and bound over by a Justice of the Peace to the grand jury. Evidence was given by the conspirators before the grand jury, and that body returned the bill "ignoramus." Whereupon Stone sued out his writ of conspiracy in Star Chamber and the question was, did the writ lie where the party appealed had not been regularly acquitted (*legitimo modo acquietatus,* as the books say). It was held that the bill was maintainable. Coke, in commenting on this decision, cites Sydenham's case and admits that the action does not lie unless the party be indicted and *legitimo modo acquietatus;* then he refers to the criminal prosecution in 27 Ass. 34, 44; then to item 6 of 27 assises 44, directing inquiry of conspirators who agree falsely to indict *or* acquit (should be "and"); then to conspiracies among wool merchants; and then to the case in 19 R. 2, br. 926, in which the dictum occurs that the writ will lie though nothing be put in execution. This argument does not justify, on the authorities, the conclusion of Star Chamber in the main case; for, sifted down, there remains the express decision of King's

Bench in Sydenham's case that the writ does *not* lie till after acquittal, and opposed to it only the *dictum* of Wadham in the case 19 R. 2.

However, Coke was seeking to justify the usurpation of jurisdiction by his beloved Star Chamber. He began sitting there himself some fifteen years later, and was noted for his high-handed and oppressive acts, as a Star Chamber judge. (See 1 Campb. Lives C. J. 305.)

Thus far the cases and the statutes show the following:

1. That it was a criminal offense by various statutes to conspire: (a) to indict falsely; (b) to commit embracery; (c) to commit champerty; (d) to commit maintenance; (e) to disturb the price of the staples.

2. That, in its criminal aspect, "conspiracy," properly so-called, could not be punished until the object had been completed; as, e. g., until the appellee of a felony had been acquitted, *legitimo modo.*

3. That, in its criminal aspect, men might be punished for a "confederacy" which was the agreement preliminary to the *statutory* "conspiracy," though nothing had been put "in ure"; this latter being a common law offense, separate from the "conspiracy"; which was but the final overt act of confederacy.

4. No civil action lay by the appellee until after he had been acquitted *legitimo modo;* this upon the doctrine of Bracton; *"ubi factum nullum, ibi forcia nulla."*

5. That there is no syllable in extant books (except in the discredited Mirror) or manuscript of any other or different doctrine or of any other or different conspiracies, from 1066 to the Poulterers' case in Star Chamber, in 1611, overruling Sydenham's case (1574) in King's Bench.

6. That there is express authority that it was no crime to conspire to forge a deed of release and put the same in evidence. Nor was it conspiracy for two to combine to assault and imprison a man to force him to pay a fine or ransom. Y. B. 39 E. 3, 13a; Y. B. 24 E., 3, 75.

It is manifest, therefore, that the Star Chamber decision in Poulterers' case not only overruled Sydenham's case, but that it marks a new and dangerous departure from the previous law. The departure is in itself not great, even with Lord Coke's rather free comments; for he strictly limits conspiracies to statutory offenses; but it opened the doors of Star Chamber, and soon a crowd of litigants pressed through, with the result that the law of conspiracy began rapidly to enlarge.

Let us see how the historian of that tribunal viewed the work. In Hudson's treatise on the Court of Star Chamber (2 Collect. Jurid. 104, 105) we find the following language: "I will conclude the particular offenses which "I shall speak of with this great offense of *conspiracy* "rarely heard of in former times, but in our age grown "frequent and familiar. And herein some questions have "arisen; as in the case betwixt Rochester and Solm it "was questioned, whether if the party is *legitimo modo* "*acquietatus*, he may sue in this Court (Star Chamber) "for conspiracy? for Sir Edward Coke would have main- "tained, that after his acquittal he was to prefer his in- "dictment at the Common Law, where conspirators were "to have their villainies judged. But the Lord Egerton "did gravely confute that opinion, and open the jurisdic- "tion of this Court, manifesting that notwithstanding "the party might have his indictment, yet that excludeth "not the court of jurisdiction: for in all cases of force

"and fraud an indictment lieth at the common law; yet "this Court will proceed for the King also. * * * "But when the party is indicted, and not *legitimo modo "acquietatus,* then can no conspiracy lie, as it was ad- "judged in Daniel Wright's case. And therefor in the "case of *Baker* v. *Hall* and Alderman Lumley and others "for prosecuting an indictment against him upon the "Stat. 3 H. 7 for taking a woman against her will and "marrying her, which indictment he avoided by error. "and upon hearing it was adjudged that he could not "prosecute a conspiracy. Otherwise it is if the party be "never indicted, and that either the malice of the adver- "sary cannot prevail to have the indictment found, as it "was in the Poulterers' case, or the plot be discovered "before it came so far, as it was in the case of Sir An- "thony Ashley. In both these cases conspiracy will lie "in this Court; and *yet no action or indictment will lie "at the common law, unless the party be indicted, yea, "and acquitted also."* (Ital. ours.) "Thus then out of "these judgments it appears, that this Court hath juris- "diction in all cases of conspiracy where the common law "hath any, and *in divers cases further than the common "law."* (Ital. ours.)

In a note to this treatise it is stated over the hand of Finch (Ch. J. of C. P. 11 Car 1) that Hudson was "one "very much practised, and of great experience in the "Star Chamber and my affectionate friend." The book was written about 1625.

Here, then, is one fruitful source of error which had tended to mislead our courts. Think of American judges following Star Chamber precedents; "Star Chamber methods" having been the synonym of all that is abhor-

rent to free institutions since the settlement at Jamestown; a court which expressly held it was not bound by common law. Hallam says of its judges that they "sat, "like famished birds of prey, with keen eyes and bended "talons, eager to supply for a moment, by some wretch's "ruin, the craving emptiness of the exchequer." 1 Hall. Const. Hist. 443.

The greater the truth, the greater the libel is good Star Chamber doctrine; why not follow that worthy old principle to replenish the exchequer. (Hudson l. c. 102.) Why not fine a few jurors £3,000 each, as was done by Star Chamber in Throckmorton's case. (Hudson l. c. p. 72.) Or punish (by fines, of course, with lopping off ears as incidents) for breaches of *proclamation?* (Hudson, l. c. 107; Hall, l. c. 441.)

Another source of fruitful error of American courts, has been the rulings of the Court of the Exchequer, which by 38 H., 8, c. 39, had jurisdiction to punish, at discretion, all trespasses, deceits, negligences, defaults, contempts, offenses and other things in which the king should be the only complainant; and that King, Henry VIII.

Finally, when Star Chamber was abolished in 1641, King's Bench took over an undefined portion of its jurisdiction. Lord Mansfield said so, and added, *Jones* v. *Randall,* Lofft, 383, that King's Bench was "the general "censor and guardian of the public manners." We know of no court in this country which has dared to assume such powers.

Yet we find the decisions of all three of these courts cited in this country indiscriminately, for the more part, long after 1607 when they, in any event, can be persuasive only, and often with reckless disregard of the fact that

the English decision is predicated on some express statute which, after the manner of English judges prior to 1800, is not cited in the opinion. All that seems to be necessary is to find a case in point on the facts and then blindly follow it. Take *Le Roy* v. *Starling*, 1 Sid. 174 (1665), for instance. Some brewers cut the price of beer and were fined 300 marks each for doing it; fined for competition (think of it), because the Court feared Charles II. would lose his revenue. That is the blunt English of that case. Yet you will find it cited and approved by court after court in this country, with endless twaddle about the "public mischief" and the like. There was no public mischief about it. A profligate king was squandering his revenues on his vices and a subservient court sought to keep him in funds without the aid of a Parliament.

And the foregoing completes the survey of the English law on our topic up to and shortly after the fourth year of James I.; the year of the first settlement in Virginia, 1607; the year at which most of our states put the statutory limit of their adoption of the common law. Subsequent to that date English precedents are persuasive merely; they are "no more than the opinions of respecta-"ble lawyers, on the other side of the Atlantic." *Cathcart* v. *Robinson*, 5 Pet. 264; *Comm.* v. *York*, 9 Mete. 93; Sen. Spencer in *Lambert* v. *People*, 9 Cow. 578, 590; *Bowie* v. *Duval*, 1 Gill. & J. 175; *Stump* v. *Napier*, 2 Yerg. 45.

A cursory examination of those latter authorities, however, will conduce to the better understanding of our own cases.

In Timberly and Childe (or Kimberty), 1663, re-

ported in 1 Sid. 68; 1 Lev. 62; 1 Keb. 203, 254, the conspiracy was to charge one with being the father of a bastard child. On motion to quash the indictment on the ground that the charge was cognizable only by the spiritual courts, and hence a common law court had no jurisdiction of a conspiracy to prefer such a charge; Twisden J. said the charge was inquirable by the Justices of the Peace. The motion was overruled, and so later was the motion in arrest.

In a similar case in 1674 the same court stayed the judgment on the information, after conviction. *Green* v. *Turnor*, 3 Keb. 399. This because the conspiracy was to extort money and not to charge with an offense.

In 1691, the Court, while Holt was Chief Justice, held it to be a criminal conspiracy to agree to charge one with being the father of a bastard, though such charge was cognizable only in the spiritual court, and though no charge was actually made in such court. *Queen* v. *Best*, Holt. 151; 1 Salk. 174, 2 Ld. Raym. 1167.

These cases are within the letter of the Edwardian Statutes, for the agreement is to prosecute before some court, though it may not have been a court of common law; also they tend to pervert justice, and are hence obnoxious to the numerous maintenance statutes.

An extension of this doctrine, which, though not strictly within the letter, is yet within the mischief, of the old statutes is found in that class of cases punishing all combinations tending to pervert justice by indirect means; as for example, to influence the Court by false affidavits respecting repairs of roads; to procure the marriage of a chancery ward; to steal a chancery ward; to buy off witnesses; to impersonate a man and marry in

his name, in order, afterwards, to raise a specious title to his property.

Rex v. *Mawbey et al.*, 6 T. R., 619 (1796).
Rex v. *Locker et al.*, 5 Esp., 107 (1804).
Wade v. *Broughton*, 3 Ves. & B., 172 (1814).
Reg. v. *Hamp. et al.*, 6. Cox, C. C., 167 (1852).
Rev v. *Robinson*, 1 Leach, 37 (1744).

A clear departure from ancient doctrine was established by that line of cases holding the combination to commit any crime to be punishable; as, e. g., to obtain money for procuring a public office; to poison horses; to poison; to forge; to steal; to induce an apprentice to injure his master's goods.

Reg. v. *Pollman et al.*, 2 Campb., 229 (1809).
Rex v. *King et al.*, 2 Chitty R., 217 (1820).
Maudesley's Case, 1 Lew., C. C., 51 (1830).
Reg. v. *Brittain et al.*, 3 Cox, 76 (1848).
Reg. v. *Taylor*, 25 L. T. (N. S.), 75 (1871).
Rex v. *Cope*, 1 Stra., 144 (1719).

A departure more radical still is to be noted in those cases declaring criminal all combinations to commit acts violative of public decency or public morals. These proceeded on the theory that the Court of King's Bench was *custos morum*.

Rex v. *Delaval et al.*, 3 Burr., 1434 (1763).
Reg. v. *Haslam et al.*, 1 Denison, 73 (1851).
Reg. v. *Howell et al.*, 4 F. & F., 160 (1864).
Nisi Prims.

Which is not a common law principle, but a clear arro-

gation of jurisdiction by King's Bench, on the authority of Lord Mansfield.

An early case (1674) started the courts off on another tangent, and became the standing precedent for perhaps the largest class of so-called criminal conspiracies of modern times. We mean Thode's case. (Reported 1 Vent., 234; 3 Keble, 111.)

As the case is reported in Ventris, it is stated to be an information for a conspiracy to entice J. S. to play and to cheat him with false dice; and this was done, whereby he lost £70. Thode came in, pleaded, and was found guilty; the others came not. Motion in arrest was overruled, and "Wylde said the difference was where the 'vil-"'lianous judgment' was to be given; and where the "conspiracy was laid only by way of aggravation, as in "this case."

The distinction is very well, if it were meant thereby that Thode and his pals were indicted for a *cheat* accomplished by cogged dice (which was an indictable offense at common law) and the allegation of conspiracy was added merely to aggravate the charge, the substance of which still remained the cheat; in which event it is not a conspiracy case at all. And this is certainly the ruling of the Court. The indictment is not preserved, and so the point must remain to be determined by the language of the opinions. As reported in Keble the case is certainly that of a cheat and not a conspiracy. We transcribe the report in full.

"*Dominus Rex* v. *Thode and Brothers Bennet & Ton-*"*son*, 3 Keble. 111 (24 Car. 2, B. R.). Information "for enticing Wingfield to play with Thode and deceptive "putting false dice on him and won 70 l. in gold, Bennet

"is found not guilty, the rest have not yet pleaded, and "only Thode found guilty, and Saunders excepted in an "arrest of judgment, that being all by way of conspiracy "one alone cannot be guilty, but *per curiam* on an action "upon the case for deceit, *conspiratione inde Habita* one "may be convicted alone, but when its action upon the case "*quod conspiraverunt,* one alone cannot be convicted; but "here being no pleading by the rest, nor no default by "the plaintiff, judgment may be given against one. So "where it is that they did conspire to get the party found "guilty to play with W. and that he deceptive cheated at "play, its well enough, which the Court agreed on, F. N. "B. Tit. conspiracione, but the parties agreed to try it "as (to) the brother."

This is a case of a cheat at common law, with false tokens, to-wit: the cogged dice, and the conspiracy is only by way of aggravation (a very common pleading in the 17th Century); and so it is not a precedent for conspiracy at all, though very often cited as such.

But whether the Thode case was a true conspiracy or not, it has been largely accepted as having established the doctrine that combinations to cheat, where the means are neither false tokens nor false weights nor false measures, are criminal conspiracies, and punishable, though the cheat never be effected and though such a cheat consummated by an individual is not an offense. *Rex* v. *Wheatley,* 2 Burr., 1125. Some of these conspiracies are, *Rex* v. *Brisac,* 4 East, 164 (1803); *Rex* v. *Gill,* 2 B. & Ald., 204 (1818); *Rex* v. *Hamilton,* 7 C. and P. 448 (1836). This doctrine is generally repudiated in the United States. See *infra.*

Some American courts have cited the case of the Jour-

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neymen Tailors of Cambridge, 8 Mod. 10 (1721), as an authority that a combination to do an unlawful act is criminal, though the act, if done by an individual, is not punishable. There were statutes making it criminal for tailors and certain other artisans to combine to raise wages. (2 and 3 Edw. 6, c. 15; 5 Eliz., c. 4.) In this case, however, the indictment did not conclude against the form of the statute; but when that point was raised the Court said the gist was the conspiracy, and so the crime was an offense at common law; which is sound under 27 Ass. 34, 44. The Court then proceeds to say: "A conspiracy of "any kind is illegal, tho' the matter about which they con- "spired might have been lawful for them or any of them "to do, if they had not conspired to do it;" citing Tub-women's case. This last mischievous declaration was *obiter* merely, and is absolutely unsupported in authority, but it has done its evil work in corrupting the law. We say that it was proper for the indictment to conclude against the peace, etc., for that the conspiracy, i. e., confederacy, was a common law offense. A moment's consideration will show that this in no manner contradicts our argument against common law conspiracies. Edward I. defined certain acts as conspiracies. Now, the judges said in 27 Ass. 34, 44, that though "nothing be put in "ure," yet was a crime complete on the agreement. That is, where two agreed to maintain each other's quarrels true or false (a thing within the statute), though they did nothing more, that was a crime; or as we now express it, the crime was complete on the meeting of the minds. This is common law doctrine. Now in the Tailors' case the statute denounced combinations to raise wages, and at once the common law doctrine attached, and the combination to raise wages became indictable as a confederacy.

though "nothing be put in ure." This is a very different thing from saying that it was a crime at common law to combine to raise wages, for it was no such thing. It may be well doubted if the Court ever made the obiter remark in the report. Sir William Burrows said of that series of reports (Modern) it was a "miserable bad book;" and again when 8 Mod. was cited: "The Court treated that "book with the contempt it deserved, and they all agreed "that the case was wrong stated." *Rex* v. *Williams,* 1 Burr. 386; *Rex* v. *Harrison,* 3 Burr. 1322, 1326.

A case of doubtful authority was decided by King's Bench in 1783, in which several were indicted for a combination to "impoverish" the prosecutor (probably a master tailor) "by indirect means," the means not being further set out. In holding the indictment sufficient, Lord Mansfield said for the Court that while an individual might sell his goods for what price he pleased, yet several might not combine to hold up prices. *Rex* v. *Eccles,* 1 Leach 274.

In *Rex* v. *Turner,* 13 East 228, Lord Ellenborough, commenting on the Eccles case, said it was determined on the ground of restraint of trade; but Lord Mansfield's language would rather indicate that it involved a disturbance of the market. If it was decided on the ground of "impoverishing" an individual it is opposed to Starling's case. To combine to disturb prices, however, was an ancient statutory offense. (See 3 Inst. 196, 95; 27 E. 3 s. 2c. 25.)

A unique case (but one now often cited) is *Le Roy* v. *Starling.* 1 Sid. 174 (1665), sometimes called the Tub-women's case, in which certain brewers were indicted, because they conspired to "depress the gallon trade;" where-

by they would impoverish the farmers of the King's excise; whereby they would be unable to pay that chosen vessel of the Lord, Charles II., his revenues, which he so greatly needed for affairs of state and other *affaires*. The case was several times argued before the King's Bench, and it was urged that it was no offense "to depau-"perate others with intent to enrich one's self, as to sell "commodities at a cheaper rate" (i. e., competition). But the verdict of guilty was sustained and defendants fined, on the theory that to "depauperate" the farmers would render them unable to pay the King. Subsequent English judges have usually become explanatory over the case. See remarks of Holt, C. J., in Daniel's case, 1 Salk. 380; 6 Mod. 99. The Bench at that time was not at all apt to decide in favor of the subject against the King. Kelynge, an ignorant buffoon, was a member. He was later impeached and got off only by an abject apology. He is chiefly remembered now for his obscene rhyme perpetrated from the bench: "Magna charta, magna farta." A judge guilty of such an indecent remark concerning the Charter of Liberties of his country could hardly be expected to protect the rights of the people against the prerogative.

And finally we come to the proposition that a criminal conspiracy is an agreement to do an unlawful act, or a lawful act by *unlawful* means. Comparing that with 33, Edw. 1, we submit it is pardonable in the practicing lawyer to indulge in some Benthamistic remarks on "Judge-"made law." In *King* v. *Parnell*, 14 Cox. 508, P. and others were indicted for a conspiracy to impoverish landlords by persuading tenants to withhold their rent. Lord Fitzgerald, in summing up to the jury, quoted the above antithesis, and said it was "plain and clear" that an agree-

ment to commit any wrongful act was indictable. "If," said his lordship, "a tenant withholds his rent, that is a "violation of the right of the landlord to receive it; but "it would not be a criminal act, * * * but if two or "more incite him to that act, their agreement so to incite "him is * * * an offense. * * * It is a crim- "inal offense where two or more agree to do an injury to "a third party, * * * though that injury if done by "one alone of his own motion, would not be in him a "crime or an offense."

(b) *The Common Law of North Carolina as to Conspiracy.*

To establish his theory of a common law offense of conspiracy, Judge Clark in the case at bar cites and relies largely upon *State* v. *Buchanan*, 5 Har. and J. 317. This is commonly called the leading American case on criminal conspiracy. The opinion written by Judge Buchanan contains a cloud of precedents, and impresses the casual reader with the conviction that it is a learned and perhaps an unanswerable disquisition on the topic in hand. A careful investigation of the authorities cited discloses a startling, nay, a shocking, condition to the lawyer accustomed to pay proper deference to the courts of the land. Without attempting to characterize that decision, we will review the precedents invoked by the writer of the opinion and let them be the commentary.

The case was a prosecution of certain officials of the Bank of the United States at Baltimore for a conspiracy to defraud the bank. There was a demurrer to the indictment, which was sustained below and the State appealed. On reversal the case fizzled out on the trial on the merits. There were eminent counsel on both sides.

Luther Martin drew the indictment; and Wirt (among others) appeared for the State; while defendants were represented by Pinckney, Winder and Raymond.

After a review of the authorities, Judge Buchanan sums up the law as follows: "That every conspiracy "to do an unlawful act, or to do a lawful act for an illegal, "fraudulent, malicious or corrupt purpose, or for a pur- "pose which has a tendency to prejudice the public in gen- "eral is at common law an indictable offense, though noth- "ing is done in execution of it, etc."

Let us see how this startling conclusion is worked out.

Judge Buchanan affects to believe that the statute of 33 Edw. 1, the "Ordinance of Conspirators," is merely declaratory of *a part* of the common law, which existed when it was passed; and that outside of its terms a great body of conspiracies existed which could be drawn upon to suit the predilections of the Court. His first point is that the act is a mere definition and prescribes no punishment. The answer to that is that in statute after statute in the preceding thirty years the various offenses named in the ordinance had had penalties affixed to them: and besides, for every felony the law prescribed the "villainous "judgment." Next he quotes 3 Inst. 143, in which Coke says the statute is merely declaratory, the reason adduced being that conspirators could be punished by the villainous judgment, which was a common law punishment. The answer to this is that that penalty was the ordinary judgment in every attaint. Next he says, "who doubts * * * "that a conspiracy to commit any felony is an indictable "offense." To which it may be answered that there never was in England a single conviction for any conspiracy outside of the statutory conspiracies from 1066 to 1665.

the Tubwomen's case, a period of six centuries, though there were numerous cases within the statute during that time. William de Thorp, one of the greatest of the Judges of Edward III., doubted it, nay, more, *denied* it. In Y. B. 39, E. 3, 13 a. (1365), one sought a writ of conspiracy against several because they had combined to forge a deed of release and put it in evidence in a former suit, whereby the petitioner had lost his case; and Thorp said: "Do "you ask a writ of conspiracy on the ground of an evi- "dence? You shall not (have it)." Coke doubted it, for in 3 Inst. 143, he defines a conspiracy to be an agreement falsely and maliciously to indict an innocent of a felony, and he does not go one step beyond that. Blackstone doubted it for he defines the crime just as Coke defines it. 4 Com. 136.

Next he says that the statute is not prohibitory, and hence the common law still stands.

Observe that Judge Buchanan quotes the ordinance in full, save the last line, "this ordinance and *final* definition, "etc." The original is, "*Ista ordinatio et finalis deffinicio.*"

Finalis, as we have stated above, refers to "boundaries" and only secondarily to a period of time. In other words, Edward meant to put the limits to conspiracies. Here clearly is Coke's "implied negative." We repeat, Coke thought that 33 E. 1 defined *all* the then conspiracies, as fully appears from his Institutes and from his gloss on the Poulterers' case.

Then the learned judge cites the instance of the Wool Merchants' conspiracy, referred to by Coke; and says that this was a *common law offense*, for it is not covered by 27 E. 3, c. 9, prohibiting exportation of wool. Did

the learned Judge examine that statute? He refers to cap. 9; did he fail to see cap. 25 of the same act? That paragraph in express terms refers to "conspiracy, con-"federacy, etc., for the impeachment, disturbance, defeat-"ing or decay of the Staples."

On page 338 the case of *Brereton et al., Noy.* 108 (proper citation Noy, 1st Ed. 103), is cited and the Maryland Court say: "This was a case of fraud effected by "a confederacy, and the injury was to an individual; the "suppression of a will by one was not an indictableoffense. "* * * It was the confederacy alone which rendered "it criminal, and therefore the information was against "the offenders conjointly."

It would be difficult to compress in the same number of words more misstatements concerning this case. It was *not* a case of fraud *effected* by a *confederacy*. All the parties were principals in suppressing the will, and the report so states. Neither the word confederacy, nor its equivalent, nor any synonymous nor cognate notion is expressed or implied in the case. It is no more an authority for a conspiracy case than if four had simultaneously assaulted and killed one, and all had been indicted for murder. True, the "injury was to an individual," just as if A had assaulted B and robbed him, and in no other sense. The suppression of the will by an individual *was* an offense cognizable by that Court, by 3 Hen. 7, c. 1, and by 4 Edw. 3, c. 11. It was *not* the confederacy *alone* which rendered it criminal, no more than in the instance of murder, above cited. The case is just as good an authority for novel disseisin or mort d'ancestor as it is for conspiracy; no better, no worse.

On pp. 339, 340, the so-called bastardy cases are cited,

first of which is *Childe* v. *North* (1663); 1 Keb. 303; s. c. 1 Sid. 68; *King* v. *Armstrong*, 1 Vent. 304; *Queen* v. *Best*, 2 Ld. Rayd. 1167; Holt 151.

These cases were conspiracies or rather "confederacies" falsely to "charge" one with being the father of a bastard child, with intent to extort money, etc. Judge Buchanan insists that the word "charge" was not used in its technical sense, but only meant that the conspirators intended to extort money from the "individual by going to him "and affirming that he was the father, etc., with a view to "inducing him to pay them to say no more about it."

This is a plain misstatement of the cases. The contention by defendants was that the contemplated charge was cognizable only by the spiritual courts and hence the common law had no jurisdiction to punish an agreement to make such a charge. This was answered by Twisden, J., in Childe's case, as reported in 1 Sid. 68, that the charge was cognizable by the Justices of the Peace. The opinion of Holt, C. J., in the Best case, too long to quote here, clearly shows the conspiracy was to make a false accusation, in a spiritual court, of bastardy, though the conspiracy did not reach the stage of actually preferring the accusation; and *"per curiam:* This is a conspiracy to "charge one falsely with fornication, which though it (i. "e., fornication) be no crime at common law, yet is pun- "ishable in the spiritual courts; and a confederacy to "charge with a thing that is a crime by any law is indict- "able." Holt, 151. In the report in 2 Ld. Raym. 1167, the indictment is that they conspired, etc., *"ad onerandum "et accusandum,"* which, of course, are terms of art, and mean to procure an indictment or an information before some judicial body. Moreover, it was stated, on p. 1169

of Ld. Raym. report, that two justices had adjudged the prosecuting witnesses (in the conspiracy case) to be the father, etc., on which Holt, C. J., remarked: "If the "defendants had pleaded that conviction it would have "been a good bar to the indictment" (for the conspiracy).

If the learned Maryland Judge had read Keble a little more closely, he would have found another bastardy case, but one fatal to his contention. In *Green* v. *Turnor*, 3 Keb. 399, the information was for a conspiracy to "draw "sums of money from the plaintiff, not for getting the "bastard." There was a difference of opinion at first among the judges of King's Bench; Twisden, J., insisting that the information did not lie. After conviction, however, judgment was stayed. This case is precisely what Judge Buchanan insists the Childe and Timberly case in 1 Keble to be; but in the latter the same Court held the combination to be indictable, while in the Turnor case defendants were discharged. This shows conclusively that the Childe case was to charge, that is, to cause to be indicted or complained against in some court, the putative father, with the ulterior motive of blackmail; while the Turnor case was just what it says it was, namely a conspiracy to blackmail and not to "charge" with bastardy, and the latter agreement was held not indictable. If further confirmation of this view be needed, it can be found in the remarks of Lord Denman, C. J., in *Rex* v. *Seccard*, 1 A. and E. 706 (1834).

On page 340 the Court cite *King* v. *Bryan*, 2 Stra. 866 (1730), for the *obiter dictum* of the English Court referring to *King* v. *Armstrong*, saying, "there the conspiracy "was the crime; and an indictment will lie for that though "it be to do a lawful act." The Bryan case was not a

conspiracy case at all, and the *dictum* was not only wholly unnecessary, but, as stated, was not the law.

On p. 344 Judge Buchanan cites the Markarty case, and while admitting that the defendants were not charged "with a conspiracy *eo nomine*. it was the combination "alone on which the prosecution would have been sus- "tained." Similar remarks are made on the Wheatley and Orbell cases. *Rex* v. *Markarty et al.*, 2 East, C. L. 823; *Rex* v. *Wheatley*, 2 Burr. 1125; *Rex* v. *Orbell*, 6 Mod. 42. Markarty's case was a cheat, *effected* by a conspiracy, a totally different offense from a conspiracy to cheat. At common law it was indictable for one to cheat another by the use of false weights, measures or tokens; so, too, it was a crime for *several* to cheat one by means of a conspiracy. It was not a crime for *one* to cheat another by false representations; but if two combined in the false representations and *thereby* effected the cheat, that was indictable as a *cheat* accomplished by means of a conspiracy. To illustrate: A sells a horse to X, falsely representing it to be sound and kind. This is no indictable cheat, because there are used no false weights, nor false tokens, nor any *conspiracy*. But A and B agree to falsely represent the horse to be sound and kind, and X, believing the combined statements, buys the horse. Here is an indictable offense—not an indictable conspiracy—but an indictable cheat; indictable because *effected* by a conspiracy. Judge Buchanan has utterly failed to grasp this distinction, though set out in most perspicuous language by Lord Mansfield in the Wheatley case; a case cited by the Maryland Court.

At p. 345 Judge Buchanan cites Edwards' case, *Rex* v. *Edwards*, 2 Stra. 707; 8 Mod. 320, *and states the deci-*

sion just exactly the opposite of what it really is. The case was a conspiracy to procure two paupers to marry, and then settle both on one parish. The Maryland Judge says that this was "held by the Court to be an indictable "offense at common law; for that a bare conspiracy to do "a lawful act to an unlawful end was a crime."

On the demurrer to the indictment in this case Lord Raymond gave judgment for the defendants, *"Because "not an offense indictable."* See the report in 2 Stra. 707.

On p. 345, Cope's case, the conspiracy was to hurt a card-maker's trade by procuring his apprentice to put grease into the paste. Judge Buchanan says it was no crime to put grease in the paste, and that the case is an authority for the proposition that an agreement to do an *unlawful act* is a crime. The answer to this is that it *was* a crime by statute for an apprentice to wilfully injure his master's goods; and so the conspiracy was to commit a *crime. R.* v. *Daniell,* 6 Mod. 99; 5 Eliz., c. 4, sec. 35.

King v. *Eccles,* 1 Leach, C. L. 274, is considered by the Maryland Court (p. 346) to be a strong case in support of the argument of Judge Buchanan. The report is meagre, but it seems that the indictment was for conspiring to impoverish a tailor by "indirect means." Speaking of this case, and of the Cope case, *supra,* Judge Buchanan says they were conspiracies leveled at individuals, in which the public had no concern. In a note to the report of Eccles case attention is called to Lord Ellenborough's statement in *Rex* v. *Turner,* 13 East 228, that the Eccles case was considered a conspiracy in restraint of trade and so one affecting the public. Yet the Maryland Judge passes this over entirely. Certainly it could not have been deemed solely to depend on the object for its criminality.

for that was simply to "impoverish;" and not a conspiracy under the authority of *King* v. *Starling*, unless the "indi- "rect means" were criminal.

On p. 347, *King* v. *Robinson et al.*, 1 Leach C. L., 37. 1744, is cited. This was a case in which the indictment charged a conspiracy for Taylor to personate Holland, the employer of the Robinson woman, and marry her "that she might entitle herself to his (Holland's) estate." They did so intermarry, Taylor being disguised in Holland's clothes and wig and using Holland's name. Of this case the Maryland Judge says: "It has been in- "geniously argued here, but not ventured on by those "who conducted the defense of Robinson and Taylor, "that they meditated a perversion of the course of jus- "tice, as her right to Holland's estate could only have "been established by judicial proceedings. It was not "so charged in the indictment, &c." It does not appear how Judge Buchanan knew what the indictment charged, for the report sets out no more than we have quoted above. In the marginal syllabus in Leach the case is stated to be a conspiracy "for the purpose of raising a "specious title to the estate;" and a reference is made to 2 East., P. C. 1010, where the language is used that the purpose of the conspiracy was that of "afterwards "raising a specious title to the property of the master." The suggestion of the court that counsel for Robinson and Taylor did not make the "ingenious" point as to perversion of justice seems a little singular. Why should they help out counsel for the Crown in making a good case against their clients?

A conspiracy to raise a specious title to an estate was a statutory offense under the express language of 33

Edw. 1, for they "confeder * * * falsely to move "or maintain pleas." This statute is in full force in England to-day, as it has been since its enactment, and its provisions have been extended and enforced by numerous other Acts. 1 Edw. 3, s. 2, c. 14 (1326); 4 Edw. 3, c. 11 (1330); 20 Edw. 3, c. 4 (1346); 1 Ric. 2, c. 4, 1 Ric. 2, c. 7 (1377); 7 Ric. 2, c. 15 (1383); 3 Hen. 7, c. 1 (1487, which is the celebrated Act reviving Star Chamber); 32 Hen. 8, c. 9 (1540). These statutes are directed at conspiracies for the perversion of justice and are in the direction of continual expansion of the Acts of Edw. I.

On p. 347 Rispal's case is cited. 1 W. Bl. 368; 3 Burr. 1320. This is not a conspiracy case at all, but a cheat effected by a conspiracy, as expressly stated by Lord Mansfield in his opinion.

Macklin's case (1 C. & K. 28 n.; 2 Campb. 372 n. The indictment is set out in 6 Wentw. 443. See 6 M. & G. 217 n.), cited by the Maryland court, is not a conspiracy case, the charge having been riot and obstruction of the play, and the words of conspiracy in the first count are only matter of inducement. The Lara case, cited at p. 347 (*King* v. *Lara*, 6 T. R. 565, 1795), is a case against a single individual for a cheat.

The De Berenger case, cited at p. 348 (*King* v. *De Berenger*, 3 Maule & S. 67, 1814), was a conspiracy to raise the price of public funds by false rumors concerning the Napoleonic wars. The Maryland Judge says: "It was clearly on the point of individual injury that the "Court went." Lord Ellenborough, who *decided* the case, said (p. 72): "A public mischief is stated as the "object of this conspiracy. * * * It is a fraud lev-

"eled against all the public." How the Maryland Court can state that the case went off on the point of individual injury, in the face of the express declaration of Lord Ellenborough, is certainly not very clear. Moreover, conspiracies to disturb the market by false rumor was made a crime, centuries before the De Berenger case was decided, by 27 Edw. 3, st. 2, c. 25 (1353); 37 Edw. 3, c. 5 (1363); 6 Edw. 6, c. 15 (1552); 25 Hen. 8, c. 2 (1533); and so the case is no authority on the common law of conspiracy.

Moreover, all of the English statutes from the time of Edw. I. to the fifth year of Geo. II. relating to conspiracies were in full force and effect in North Carolina at the date of the decision of the Younger case, *infra*. See Xavier Martin's Collection of the Statutes, 1792.

As to the case of the Journeyman Tailors of Cambridge (8 Mod. 10), cited on p. 350, we have elsewhere commented thereon and shown that it in no wise supports the argument of the Buchanan case. The remark of the Maryland Court, that the indictment was not under 7 Geo. 1, st. 1, c. 13, is quite true, but for a reason that that learned judge did not in the least suspect, viz., that the statute in question applied only to tailors "with-"in the bills of mortality," *i. e.*, London, and not to Cambridge tailors; but nevertheless there were statutes covering the case of their agreements to raise wages, 2 & 3 Edw. 6, c. 15 (1548); 6 Edw. 6, c. 15 (1552), and 5 Eliz., c. 4 (1562); and as we have explained before, the statute having denounced the "conspiracy" to raise wages, under the decision of 27 Ass. 34, the "confederacy" to do so was a common law crime. This case is generally discredited. Stephen says it is of "doubtful" authority (3 Steph. Hist. Cr. L. 209). Lord Campbell

declined to follow it (*Hilton* v. *Eckersley*, 6 E. & B. 47, 62). In addition to the unreliability of Modern R. the case intrinsically is suspicious, for the reporter seems to make it turn on 7 Geo. 1, which, as we have said above, did not apply to Cambridge.

King v. *Delaval*, 3 Burr. 1434 (1763) is cited on p. 350. This was where a master conspired to assign the indentures of his female apprentice to defendant for purposes of prostitution. The Maryland Court say the end was not unlawful, but the conspiracy alone made the crime. It cannot be doubted that at that time the master could have been indicted for the offense, aside from the conspiracy, under the declaration of Lord Mansfield that King's Bench was *custos morum*. *King* v. *Sidley*, 1 Sid. 168 (1664); *Bagg's Case*, 11 Rep. 93, 100.

On p. 350 the Court cites Hawkins P. C. and professes to quote him as follows: "There can be no doubt that "all *combinations* whatsoever wrongfully to prejudice a "third person are highly criminal at common law." Hawkins does not use the word "combinations" but "confederacies," a word which had a very different meaning from combination in his day. We have examined his statement elsewhere in this argument and shown that as understood by the Maryland Court the doctrine is flatly contradicted by the very authorities cited by Hawkins.

The foregoing are practically all of the authorities relied on by the Court in the Buchanan case. Some of them are misquoted; some are misstated; in some there are suppressions; in some reckless statements are made as to the common law when the cases were founded on statutes; several are not conspiracy cases at all; in one at least (Edwards case) the judgment of the Court is

precisely the opposite of that given by the Maryland Court!

The Court is also capable of misstating a case which makes against its thesis; for example, *Rex* v. *Turner*, 13 East. 228, which was an agreement to go upon another's grounds, with ar[illegible], and there to snare hares. Lord Ellenborough, in holding this not an indictable offense, says that the agreement was "to go and *sport* upon an-"other's ground," meaning of course (as the report says) to snare hares there; to poach; but Judge Buchanan seizes upon the phrase "to sport" and calls it entering another's close "for the purpose of *innocent amusement*," as though the defendants had been boys entering to play leap-frog!

So also is the Court capable of omitting entirely cases which are not decided to its liking; for while citing cases from the Year Books, he omits to cite the case of the forged release, held not to be a ground of conspiracy: Y. B. 39 Ed. 3, 13a.; he omits the agreement to imprison, held not a conspiracy; Y. B. 24 Ed. 3, p. 75: he persists in stating that it was a *common law conspiracy* for merchants by "conspiracy, confederacy, &c.," to disturb the staples and raise the price of wool, and cites in proof thereof the Articles of Inquest of 1354 directing the Assises to inquire into such conspiracies, 27 Ass. 44, item 19, when in truth that "item" follows exactly a new statute of Edw. 3 just passed. 27 Edw. 3, st. 2, c. 25. He misstates Lord Coke's doctrine of conspiracy in the Poulterers' case; and, perhaps worst of all, in his attempt to show that 33 Edw. 1 meant only to define a few of the then existing conspiracies (pp. 334 *et seq.*) he omits the last line, which calls the statute the "ordinance and *final definition* of conspirators."

The very essence of a judicial decision founded on precedent consists in a faithful and true presentation of the authorities relied on; that many of those authorities exist *only in a language unintelligible* to the majority of the bar emphasizes the need of truth. Speaking for the bar and the litigants represented by them, we affirm that our respect for the American bench is bottomed principally on a well founded belief in the moral and intellectual honesty of the incumbents. Take away that confidence and anarchy will impend. We venture the assertion that nine out of ten conspiracy cases in this country since 1825 have cited and followed the Buchanan case. On its authority hundreds of men have lost their liberty. We now appeal to this Court to set its seal of condemnation upon this partisan decision, this false precedent.

It is scarcely worth while to pursue this question of a common law conspiracy further. An examination of the American cases will disclose that they are, one and all, founded upon the English cases already reviewed; or upon Hawkins' statement; or upon some blind copyist of Hawkins, as Archbold, Chitty, Bishop or Wharton; or upon the Buchanan case. If we have succeeded in our endeavor to show the polluted source of this stream, what boots it to analyze the waters lower down?

Take two instances only, Massachusetts and New Jersey; both of them in the very first rank as expositors of the law.

In *Comm.* v. *Judd*, 2 Mass. 329 (1807), Ch. J. Parsons held that a combination to manufacture a spurious article of indigo and to put it on the market as the prime article was a common law criminal conspiracy. The learned judge defines the crime: "A conspiracy to do

"a lawful act for an unlawful purpose is an offense." He cites only three authorities: *Rex* v. *Edwards*, 2 Stra. 707; 8 Mod. 320; *Rex* v. *Robinson*, 1 Leach 47, and the *Journeymen Tailors' Case*, 8 Mod. 10. The first of these was the combination to settle two paupers on a certain parish by causing them to intermarry, which was held by Lord Raymond to be *no indictable offense;* the second was a crime by virtue of the English statutes 2 & 3 Edw. 6, c. 15, and 5 Eliz., c. 4; the third was a maintenance case within 33 Edw. 1. It is thus clearly to be seen that the decision finds absolutely no support in the authorities cited. It is but fair to say, however, that the Court had no assistance whatever from counsel for defendants. They seem to have rested their case on the futile proposition that a conspiracy to defraud the public generally was no offense; apparently conceding that the combination to sell the inferior article to individuals named would have been criminal.

In New Jersey the early statute of conspiracy restricted the crime to combinations to indict an innocent falsely of a felony. A case arose in 1827 in which the indictment charged a conspiracy to defraud a bank by drawing checks when the conspirators had no funds. *State* v. *Rickey*, 4 Halst. 293 (1827). The indictment was quashed by the Supreme Court; by Ford, J., because it was no conspiracy to agree to defraud the bank by the means proposed, holding that there was no conspiracy at common law; and by Drake, J., because the frame of the indictment was defective. The opinion of the first named judge is instructive. He quotes Coke and Blackstone on conspiracy, both restricting it to 33 Edw. 1; then he takes up Archbold's definition, which is a literal transcript of Hawkins, and reviews the for-

mer's authorities, showing how far short they fall of the definition.

But later the same Court takes up the same question. *State* v. *Norton*, 3 Zabs. 33 (1850), and chiefly on the authority of *State* v. *Buchanan and Hawkins*, repudiates the sound reasoning of Judge Ford, and insists on the undefined "common law" conspiracy.

In the opinion of the majority in the case at bar, we find, as above stated, *State* v. *Buchanan* put in the front rank.

Next is cited *State* v. *Burnham*, 15 N. H. 396. This case relies on the following authorities: Hawk. P. C., which we have already referred to and demonstrated that the text, as generally now understood, is wholly unsupported, nay even contradicted, by the precedents cited; Chitty, Russell and Archbold are merely servile copyists of Hawkins; *Comm.* v. *Judd*, 2 Mass. 329, which, as we have shown, relies on one case holding the combination *not* to be a conspiracy, and two others covered by English statutes; *Comm.* v. *Hunt*, 4 Metc. 111, which holds that a combination among workmen not to work for any employer who employed journeymen not members of the boot-makers' club was not a crime. Much is said in this last case by the learned Ch. J. Shaw about what acts are or are not indictable conspiracies; but the only point ruled was as stated, and that the indictment did not charge a crime; the rest was *obiter*. *Lambert* v. *People*, 9 Cowen 578, holds an indictment to cheat and defraud by wrongful and indirect means does not state a crime. The opinion of Senator Stebbins referred to by the New Hampshire Court is a minority opinion. *King* v. *Seward*, 1 Ad. & E. 706, holds a com-

bination to procure two paupers to intermarry to settle both on one parish is *not* an offense. *King* v. *Eccles*, 3 Doug. 337, we have heretofore discussed. *Fowler's Case*, 3 East. P. C. 461 (should be 1 East. P. C. 461), was the same as Seward's (*supra*) and was held *not* indictable. *Best's Case*, 2 Ld. Raym. 1167, was a conspiracy to prosecute one criminally within 33 Edw. 1. *Vertin* v. *Lord Clive*, 4 Burr. 2475, was a combination among nearly all the officers in command of Sepoys to resign in time of public danger. It was held under the *Indian Mutiny Act* that this was a crime. This is a case decided under military, not under common law. *Comm.* v. *Davis*, 9 Mass. 415, seems illy considered. It would appear to be a cheat effected by a conspiracy and not a conspiracy to cheat. The opinion is just one line and a half long. It does not seem ever to have been cited in Massachusetts in subsequent cases. *Gill's Case*, 2 B. & Ald. 204, was a case which held a charge of conspiracy to cheat and defraud by divers pretenses and subtle means was good. This case has been strongly criticised by the English bar and subsequent English cases. (See *Rex* v. *Richardson*, 1 M. & R. 402; *Rex* v. *Fowle*, 4 C. & P. 592; *Rex* v. *Bins*, 1 A. & E. 327; *Rex* v. *Peck*, 9 A. & E. 686.) The matter has been cured in England by making a bill of particulars demandable of right; a virtual overruling of the Gill case. *State* v. *Buchanan*, 5 Har. & J. 317, on which we have commented at length The *Tailors of Cambridge Case*, 8 Mod. 10, which, as we have shown, is founded on an English statute. *King* v. *De Berenger*, 3 M. & S. 67, also under a statute, as shown above.

Thus we see the New Hampshire case is without support in the authorities cited.

The case of *State* v. *Pulle*, 12 Minn. 164, next cited by Judge Clark, is even worse, for to the point of common law conspiracy only the single authority of the Judd case, *supra* is cited.

Judge Clark then refers to *Comm.* v. *Hunt, supra*, which only decided one point, and that against the alleged conspiracy. Then *U. S.* v. *McCord*, 72 Fed. R. 159, is cited. This went off on the sole point that limitations began to run from the instant the minds of the conspirators met.

Then, of course, *State* v. *Younger*, 12 N. Car. 357 (1827), is cited by Judge Clark. This was a combination by several to get one drunk and cheat him at cards. There was a motion to arrest the verdict of guilty. The Attorney General submitted the case in the Supreme Court without argument, and there was no appearance for defendants. Thus was the Court without assistance.

After stating the ancient law of conspiracies, the learned Ch. J. Taylor remarked that modern cases had greatly extended the older doctrine, so that "every con-"spiracy to injure individuals, or to do acts which are "unlawful, or prejudicial to the community, is a con-"spiracy and indictable; as where divers persons confed-"erate together by indirect means to impoverish another: "or falsely and maliciously to charge a man with being "the reputed father of a bastard child; or to maintain "one another in any matter, whether it is true or false. "(Hawk. 466, sec. 2.) Playing at cards for money is "in itself unlawful, and where two persons conspire to-"gether to make an unlawful act the means of doing an "injury to or impoverishing another, it is stronger than "many of the cases which have been held indictable.

"Even a bare conspiracy to do a lawful act to an un-"lawful end has been held indictable, though no act was "done in consequence thereof. (8 Mod. 321.)" The Court then cites the Wheatley case, the Mackarty case and *Comm.* v. *Ward,* 1 Mass. 473.

In the instances given by the learned Judge we discover some old friends. To impoverish another by indirect means is the Eccles case; to falsely charge one with being the father of a bastard is the Timberley and other bastardy cases; both of which we have examined at length, *supra.* To maintain one another, true or false, is directly covered by 33 Edw. 1, then in force by express enactment in North Carolina. 8 Mod. 321 is the Edwards case, held *not* indictable. *Comm.* v. *Ward,* 1 Mass. 473, was a combination to get goods on credit and abscond. There was no motion in arrest; but in a note the reporter naively says he supposed the motion was abandoned, because counsel's attention had been called to the Mackarty and Wheatley cases, both of which are old acquaintances, but neither a conspiracy case. The Ward case is referred to in *Comm.* v. *Eastman,* 1 Cush. 189, 224, as being *dictum* merely; and was there distinctly overruled, if a *dictum* can be said to be overruled. Thus examination shows the ruling in the Younger case to be based on no precedent whatever.

Next the majority opinion cites the Brady case (107 N. Car. 822). The opinion in this case cites the shop-worn English precedents on the frame of the indictment, and for the nature of the offense relies on the Younger case. Follows next the Powell case (121 N. Car. 635). No authority cited save Wharton's forms. Finally the Wilson case (121 N. Car. 650) is appealed to. This

last, so far as the offense of conspiracy is concerned, relies on the Younger case and 2 McClain Cr. Law, § 959.

Thus, so far as North Carolina has decided, conspiracies in that State rest principally on the Younger case; and this laborious analysis of the majority opinion in the case at bar shows, we submit, that the conclusion as to what is a criminal conspiracy and that there was such an offense at common law to be wholly without valid support.

The inconsistency of the North Carolina cases in their rulings as to common law crimes is well illustrated by the decision in *State* v. *Kessler*, 78 N. Car. 469, which holds that incest is not a common law crime; and since there was no such offense by statute, defendant was discharged. Yet the common law offense of incest rests upon precisely the same authority as the common law offense of conspiracy, namely the "Mirror," Seld. Soc. Ed., pp. 28, 29.

(c) *Common-law of conspiracy abolished by Statute in North Carolina.*

If there ever were any such thing as a common law of criminal conspiracy in the State of North Carolina, it has been abolished by statute.

The Statute of North Carolina provides, Rev. Code, § 641: "All such parts of the common law as were "heretofore in force and use within this State, or so "much of the common law as is not destructive of, or "repugnant to, or inconsistent with, the freedom and "independence of this State and the form of government "therein established, and which has not been otherwise "provided for in whole or in part, not abrogated, repealed

"or become obsolete, are hereby declared to be in full "force within this State." This Act has been in force in substance since 1715.

In addition thereto, long prior to the Declaration of Independence a great number of English statutes of a very early date were also in force. These included nearly all of the general acts of the English Parliament, not peculiar to local conditions, from Magna Charta to George II. (see Xavier Martin's collection, 1792) and embraced all of the conspiracy statutes which we have cited above.

Now in 1827 the case of *State* v. *Younger*, 12 N. Car. 357, was decided, by which a very broad definition of criminal conspiracy by the common law of the State was established.

Upon the face of the Statutes and the Younger case we have then: All the English statutory conspiracies; all the English common law conspiracies; and conspiracies covered by this last mentioned case.

This situation continued practically unchanged for forty years (except for the repeal in 1834 of all of the English Statutes above mentioned) until 1868, when an Act was passed making it a criminal offense to conspire to incite insurrection, etc., and denouncing a maximum penalty of ten years.

Our contention is that the passage of this act *ipso facto* repealed all of the so-called common law of conspiracy in North Carolina, whether established by the English cases or as interpreted by the Younger case; and this by force and virtue of the Statute above quoted adopting the common law.

The rule at common law is that "a statute made in

"the affirmance, without any negative expressed or im-"plied, doth not take away the common law." 2 Inst. 200.

It is manifest, however, that the Statute in question abrogates this rule and adopts exactly the reverse principle. Reduced to its lowest terms, touching the point here under discussion, it reads: "So much of the com-"mon-law * * * which has not been otherwise pro-"vided for, in whole or in part, * * * (is) hereby "declared to be in full force within this State."

Coke's illustration of the common-law rule is the case of trespass in parks or ponds under West. 1, c. 20; for which vindictive damages and imprisonment are given by the ordinance; whereas at the common law only actual damages could be had; but as the Statute contained no negative words, the common-law action still remained. 2 Inst. 199, 200. Under the North Carolina act, however, any common-law action of trespass theretofore existing would, on the enactment of a law covering such action, be *ipso facto* repealed, though the new law contained no negative, expressed or implied.

But the North Carolina Statute goes a step further and provides that, if any "part" or topic of the common law is legislated upon, without any saving clause, the whole part or topic is abrogated, leaving only the statutory enactment as the entire law on the subject.

A moment's consideration will disclose that this must be so, for there are only two possible constructions to be put upon this portion of the act in question, viz.: the phrase "in whole or in part." First, it must mean that when the legislature provides for a part of the common-law topic, it means to repeal only that portion covered

by the Act, leaving the remainder of the topic in force; or, second, by such provision it means to abrogate the common law covering the entire topic. For example: If the act were to declare that mayhem shall consist of the cutting off one's hand, and affix a punishment, this might be construed as merely changing the punishment for that particular mayhem, leaving the other varieties to be cared for by the common law; or it might be held as repealing all the common law of mayhem, and substituting therefor only the destruction of a hand.

But to give it the first construction would be to render wholly useless and nugatory the entire phrase, "in whole or in part;" for if these words were left out, the first construction would hold whether all or a portion only of the particular topic were legislated on. That is, to change the illustration, if conspiracy to rebel were the portion legislated on it would be a part of the common law which has "been otherwise provided for," leaving the rest of the body of the common law of conspiracy in full force and effect, and the additional words, "in whole or in part," neither add to nor take away from that construction.

If those words are to be given any effect there, it can only be by the construction contended for, the second one above. Thus if the whole law of conspiracy were attempted to be defined, or if only a part of that topic, in either case all the common law on that subject is repealed, as we contend.

Particularly should this construction be adopted in penal cases for the additional reason that it is in favor of liberty.

United States v. *Wiltberger*, 5 Wheat. 76.

That this was the understanding of the legislature seems clear; for, two years later (Laws 1870-1), they pass an act denouncing a penalty against railroad employees who conspire to cheat the railroad company. Later, in 1879, a law to punish conspiracies to abduct children. And finally, in 1889 (c. 374), an act to define and punish conspiracies against trade (so-called anti-trust act).

From 1834 to the present date the four above-named combinations are the only ones mentioned by the Statutes of North Carolina.

We conceive our argument to be greatly strengthened by the foregoing legislation. The object and purpose of the Act of 1868 was to enact a law of conspiracy respecting uprisings, and thereby in connection with sec. 641, *supra*, to repeal all common-law conspiracies. Experience showed that the law was inadequate and other acts were passed as above set out.

It may be urged that, since 1868, the Supreme Court of North Carolina has passed on the subject of conspiracy, and has again held the English common law on that subject to be in force.

Whatever may be said of the later cases, it must be conceded, we think, that no case prior to 1868 can possibly be an authority on the question of whether or not the Statute of 1868 operated as a *repeal* of the common law of conspiracy. The Younger case would still stand as a precedent as to what *was* the common law of conspiracy; but not at all pertinent to the effect of the Act of 1868.

The first case after 1868, on the nature and definition of conspiracy, was in 1880, *State* v. *Jackson*, 82 N. Car.

565. This was a conspiracy to indict a woman for infanticide. No point was made on the indictment, and the case was reversed for manifest error. The case of *State* v. *Brady*, 107 N. Car. 822, decided in 1890, did not discuss the nature of the crime, but only the frame of the indictment, assuming a combination to cheat and defraud to be a crime. In *State* v. *Turner*, 119 N. Car. 841 (1896), no question is raised on the charge, which was a combination to defraud insurance companies. *State* v. *Powell*, 121 N. Car. 635, and *State* v. *Wilson*, 121 N. Car. 650, both were in 1897 and both combinations to prostitute women. *State* v. *Mallett*, 125 N. Car. 718 (1899), was a conspiracy to cheat and defraud creditors.

The foregoing constitute all the cases on conspiracy since 1868 in which the combination was expresssly or impliedly held a crime. A reading of them leaves a sense of the utter inadequacy of the discussion, on the part of either court or counsel, of the nature of the crime. The strong impression is that counsel left the Court without assistance and that the latter failed to grasp the principles underlying the law. For example, it is gravely said that it is an essential ingredient to the crime that "the common purpose was carried into execution." (Turner case, *supra.*)

The point here insisted on, however, is that no reference whatever is made to the statutory condition of the offense, the statute adopting the common law and the effect of the Act of 1868, in conjunction therewith, in repealing the common law of conspiracy. This legal aspect does not seem to have occurred to counsel in these cases, and is not anywhere mentioned by the Court. It

results that the statute in that aspect has never received judicial construction in the State, and the decisions above recited cannot be binding until they shall have been considered in reference to the statute. It has not infrequently happened that a statute bearing on the case on hearing has been overlooked by court and counsel and the case decided without reference to its terms. In such event it has never been held that the decision was in any sense a construction of the statute.

THERE BEING NO LAW WHATEVER OF NORTH CAROLINA, STATUTORY OR COMMON, COVERING THE ACTS OF APPELLANTS, THE SENTENCE AND JUDGMENT WERE NOT "DUE PROCESS OF LAW," AND HENCE UTTERLY VOID.

This proposition is the correlative of the provision in our Constitution forbidding the States to pass *ex post facto laws*. If a State legislature may not, after the fact, make that a crime which was not theretofore a crime; so, on the other hand, State courts will not be permitted to adjudicate into crimes acts of a defendant on trial which were innocent at the time such defendant was indicted.

This latter proposition, we take it, was true even before the enactment of the XIV Amendment, under the authority of *Loan Association* v. *Topeka*, 20 Wall. 655; *a fortiori* is it true since the adoption of that Amendment.

We have become so used to a recurrence to the letter of our various Constitutions, National and State, that we are apt to overlook the existence everywhere in our country of unwritten constitutions, without which the mere written documents would be waste paper. No country ever succeeded with an alien made-to-order written constitution; no civilized country exists today with-

out some sort of an unwritten fundamental law. The English Constitution is as vigorous, as certain and as free as our own; though wholly unwritten. Connecticut had no written Constitution till 1818; Rhode Island, not until 1842.

We recognize and obey, and our courts enforce, the provisions of our unwritten Constitutions, just as we do the written provisions, because both are the product of the evolution of our race; they are a part of our mental and physical organization. These are the veriest platitudes stated alone, but it is not usual to see the statements brought together in their legal aspect; and yet this is perhaps their most important aspect.

Now, whether it be included in due process of law or not, or in the rights, privileges and immunities of citizens of the United States, or as a right guaranteed as fundamental by our unwritten Constitution, we submit that no State court can be permitted to create a wholly new crime and assess a penitentiary sentence on conviction thereof. Certainly not so long as the case of *Loan Ass'n* v. *Topeka* is an authority in this land. Suppose, for example, some State had revived the practice of Star Chamber, before the adoption of XIV Amendment, whereby defendants could be convicted and grievously punished without a jury, on *depositions* of witnesses without cross-examination and without counsel. Would not a Federal court say: "Our ancestors fought that engine of tyranny for two centuries. It well nigh destroyed our liberties. We abolished it in 1641. A few years later we chopped off a King's head quite largely on account of that very court. It has become an unwritten fundamental right for our citizens to be tried in

a wholly different way; and we will not permit a revival of the old." Such, at least, seems to us would have been a perfectly sound argument prior to 1868.

If a State should attempt to establish *lettres de cachet* as they existed under Louis XIV would not this court now say that they are not due process of law? And if so, where would we get our definition of "due process" except from our unwritten Constitution? Thus we push the matter back one step and that is all; we still reach the elder, the unwrittten law. We have discussed a slightly different aspect of this matter under subdivision 7 below, citing many decisions of this Court recognizing the principle now contended for. To these authorities we respectfully refer the Court, to be noted in this connection.

It may not be inappropriate to digress for a moment to call the attention of the Court to the fact that a vast deal of fustian has been written on the esoteric nature of this crime, its mystery, its secrecy and its dangerous character. It may well be granted that when the combination embraces a great number of people, as in widespread treasonable conspiracies or agrarian outrages, the statements are true; but when two or three combine merely to effect some private wrong, as in this case, such language is hyperbolical to the highest degree. If several, for example, get together in a room and agree to cheat some one or to commit any ordinary crime, the combination has absolutely harmed no one save the conspirators, and society is no whit injured. It is simply to misuse language to say otherwise. If now these conspirators begin to act, as a rule, little or no harm is done to society or the individual, until the object of the con-

spiracy is accomplished. When that is done, in all but an infinitesimally small portion of the cases, some substantive statutory crime has been committed, in which all are principals, or some principals and some accessories; and for which all may be punished at least as heavily and generally more harshly than for the conspiracy. The writer conceives there is little use for the law of conspiracy nowadays, except in the rare cases where the combination is discovered before executed. The legislatures of many States have recognized this reasoning, and have narrowed this field more and more. Some courts and many prosecutors, however, still insist on the "mystery" and the "danger;" but this, it is submitted, means only that it is easier to prosecute a conspiracy case, and more difficult to defend one, than any other kind in the books. In no class of cases have so many innocent persons been convicted. As said by Judge Campbell in *People* v. *Barkelow*, 37 Mich. 455, 457: "The course of legal experi-"ence has shown this to have been a familiar resort to "catch innocent persons, by throwing a drag-net of "vague charges and resorting to suspicions and preju-"dices to induce juries to convict persons who find it im-"possible to escape the malicious insinuations of false "accusers."

This digression has been ventured to show that the crime itself has been enormously exaggerated, probably because we connect the word conspiracy with great seditious and agrarian movements; and so the common offense shines almost wholly by reflected light. It will, therefore, be of no moment to the State of North Carolina if the crime be abolished by this Court. If her people wish a comprehensive law on the subject, it will be a simple matter to enact one.

2. *There was no statute of North Carolina authorizing this heavy punishment.*

The majority of the Court relies upon *State* v. *Mallett*, 125 N. Car. 718, but does not mention *State* v. *Jackson*, 82 N. Car. 565, which holds directly the contrary. The statute construed in the Mallett case is as follows: "Sec. 1097. Offenses made misdemeanors by statute, "where a specific punishment is not prescribed, shall be "punished as misdemeanors at common law, but if the "offense be infamous or done in secrecy or malice or "with deceit and intent to defraud, the offender shall be "punished by imprisonment in the county jail or peni- "tentiary not less than four months nor more than ten "years, and be fined." An examination of this section shows it to have been made up by consolidation of Bat. Rev., ch. 32, sec. 29 and sec. 108. The Jackson case was decided before this consolidation. The sections are as follows: "Sec. 29. Every crime or offense whatever "heretofore punishable by the laws of North Carolina "when the present constitution went into effect with pub- "lic whipping or other corporeal punishment, shall here- "after, in lieu of such corporeal punishment, be punished "by imprisonment in the State's prison (or county jail) "for not less than four months nor more than ten years."

"Sec. 108. Offenses made misdemeanors by statute, "where a specific punishment is not prescribed, shall be "punished as misdemeanors at common law, but the pun- "ishment prescribed in Sec. 29 of this Chapter shall be "used only for crimes that are infamous, or done in "secrecy and malice, or done with deceit and intent to "defraud." It is perfectly manifest from an inspection of these three sections that the first is made up by con-

solidating the last two; and that the latter part of the first section applies only to "offenses made misdemeanors "by statute." This latter proposition is established by the historical aspect, as just shown, for certainly section 108 has reference only to the statutory crimes, and, in the consolidation, its meaning is not extended.

The proposition is also clear and certain from the grammatical construction of the section. The Jackson case, *supra*, so held.

The Mallett case changes that ruling, without citing the Jackson case, on the theory that a conspiracy to defraud is "one 'done with deceit and intent to defraud.' "It is the very essence and substance of it." No attempt is made to explain away the opening phrase of the statute: "Offenses made misdemeanors by statute:" but it is baldly assumed that the latter half of the section refers not only to statutory misdemeanors, but also to all non-statutory common law offenses of that grade; an assumption not tenable under any of the known rules for statutory interpretation. But even conceding for the moment that common law misdemeanors are included within the punishment portion of the section, yet is the interpretation of the Court in the Mallett case and this case wholly indefensible on sound principles. "Deceit" and "defraud" must be used in their technical and not in any loose colloquial sense, since the statute is criminal and one prescribing an exceedingly harsh punishment. This is elementary. Now deceit and fraud at common law in their criminal aspect embrace only the use of false weights, tokens or measures, or a cheat effected by a conspiracy. *King* v. *Wheatley*, 2 Burr. 1125. In the exhaustive examination of the law by the twelve judges

of England in the case of *Reg* v. *Bryan*, 1 Dears. & B. 265, a Crown case reserved, the bench consisted of Lords Campbell, C. J., Cockburn, C. J., Pollock, C. B., Coleridge, Cresswell, Erle, Crompton, Crowder, Willes J. J., and Bramwell, Watson and Channell, barons, probably as learned a bench as ever sat in England. Each judge delivered an opinion, ten concurring, Bramwell, *dub.*, and Willes, *diss.* This was under a very broad statute, 7 & 8 Geo. 4, c. 29, § 53, which provides that if any person shall "by any false pretense" obtain the money, &c., of another with intent to cheat he shall be guilty, &c. The substance of this decision is that there are many false pretenses which do not constitute a cheat within even the all-embracing language of the statute of Geo. IV.

In North Carolina the Court has always held that a cheat must be by false token, weighs or measures, in order to be criminal. In *State* v. *Justice*, 13 N. Car. 199, though the fraud was "flagrantly marked with moral "turpitude," yet because there was no false or public token, nor any practices which would deceive the public at large, it was held no crime. "Civil injuries," say the Court, "should not be the subjects of criminal prosecu- "tions. Good policy does not require the multiplication "of public offenses." See also *State* v. *Politto*, 11 N. Car. 348; *State* v. *Alfred*, 84 N. Car. 349; *State* v. *Phifer*, 65 N. Car. 321; *State* v. *Burke*, 108 N. Car. 750.

An exhaustive case by the Supreme Court of the District of Columbia is that of *U. S.* v. *Watkins*, 3 Cranch C. C. 441.

Again, the Statute uses the word "done;" done with deceit. This implies a finished crime accomplished by

the deceit of some person. But the crime here under consideration was "done" before ever Garrett was seen by any of the defendants. It was "done" when the minds of the alleged conspirators met, prior to the time that any representations were made to the prosecuting witness, and before ever he was aware of the existence of the actors. This is as old as 27 Ass. 34, 44. How then can it be said that this offense was "done with "deceit and intent to defraud?"

Finally, this ruling must be wrong, because by the more than doubtful construction of a doubtful statute the settled criminal law of North Carolina has been changed, and changed into a much harsher channel. It is against all precedent and against reason to suppose the legislature meant to make this radical change by *implication*. That body had named and defined two classes of criminal conspiracies and prescribed a maximum punishment of ten years. Rev. Code, § 974; R. C., § 1107. Why enact these laws if they were already covered by §1097 and the same punishment therein provided? It is said that Nero wrote his edicts in small type and hung them up almost out of sight. 1 Colquhoun Roman Law 316 n. 5. It is submitted that that was no worse than this act of judicial interpretation, overruling the Jackson case, without mentioning it, and establishing this greater punishment, theretofore unknown in the State.

It is a rather curious fact that in the reference to § 1097 in the opinion in the Mallett case, the writer does not *quote* that section, but its legal effect only is attempted to be stated, and that in a manner which the text of the law is far from justifying. It is stated as if the section were divided into two parts; the first re-

ferring to statutory misdemeanors, and the last, as if *in terms* it embraced *all* misdemeanors, statutory or at common law. See p. 723 of opinion.

It has been frequently held by this Court that it will not interfere with the construction of a State statute by the State courts; but is this a hard and fast rule, subject to no exception? Suppose such a construction denies a citizen of the United States some "fundamental" right which belongs to him as a member of a free government, must the rule still apply? We have endeavored in subsection 7, *infra*, to elaborate this question; and to that we respectfully refer the Court for the extended argument, pausing here to make a single suggestion. Suppose a statute of a State defined murder as a felonious killing, with malice, &c., prescribing the death penalty; and the State courts should uphold, under that statute, a capital sentence under a simple assault charge. Would the rule of non-interference by the Federal courts still hold? If this be an exception to the rule, then somewhere between the instance of a manifestly proper interpretation of a State statute by State courts and the extreme case put, must lie the dividing line. It is suggested that the following should be the test: If the construction put upon the statute by the State court be so manifestly wrong that the Federal court, on undisputed canons of construction, can unhesitatingly say the State court is in error; and further, if such error be to the prejudice of some fundamental or constitutional right of a citizen of the United States, then it would be the duty of the Federal court to set aside the judgment of the State tribunal based on such erroneous construction.

Such is this case.

3. *The sentence was not due process of law, because*

greater than can be inflicted for the offense in any other American judicatory.

Montesquieu says: "It is an essential point that there "should be a certain proportion in punishments, because "it is essential that a great crime should be avoided "rather than a lesser." I. Sp. Laws, Bk. VI., ch. 16. Grotius discourses at length on the proportion that should exist between crimes and their respective punishments: and places in the lowest scale, as deserving the least punishment, "those criminal designs, which have proceeded "some degrees, but not to the last stage of completion." De Jure, ch. xx., par. xxx. In an altogether admirable essay on Prison Ethics, Mr. Herbert Spencer points out the evils of excessive punishments for crimes, admitting that in the less advanced stages of civilization a harsh code is needful. But as men progress in manners, severe punishments, instead of being deterrent, actually defeat the preventive object of society by exciting in the mind of the criminal a sense of injustice and animosity, causing him to dwell on the injury done to him by society rather than on his own misdeeds. Thus he nurtures a spirit of revenge rather than a desire for atonement, and on his enlargement reënters society a worse and more dangerous man than when he left it. Essays, Moral, &c. D. Appleton, 1884, pp. 218 *et seq.*, 239 *et seq.* The illogicality of such sentences was demonstrated in England in the 18th Century. When a slight crime was punishable with death, the offender was not at all likely to stop at a greater. As well be hung for a sheep as a lamb; and so, instead of exercising a deterrent influence on minor criminals, the bloody code directly encouraged grave offenses. Leckey in 6 England in XVIII. Cent. 245 *et seq.*, draws a graphic picture of crime and its

punishment during that time. Among other evils of harsh punishments he points out the constant perjury of juries in their unwillingness to condemn to death for trivial offenses.

But the best commentary on this sentence is the 8th Amendment to our Constitution, by which cruel and unusual punishments are prohibited. No point is made in this connection that this amendment applies in a legal sense to the case at bar. The broad statement is hazarded that the provision quoted expresses the genius of the American people; that it declares a fundamental principle among us that an excessive punishment is abhorrent to our system of judicature; and that crimes and punishments should bear some relation of proportion to each other. In short, that as a people we are opposed to arbitrary and excessive punishments. The framers of our Constitution were either fresh from England, or they knew by observation or mediately from their parents, the details of the "bloody code." The Eighth Amendment was the revolt from these extreme punishments.

The truth of the foregoing is made manifest by the legislation of the various States of our Union on the subject of the punishment of conspiracies:

Arizona, one year and $1,000; P. C. § 170.

California, one year and $1,000; P. C. § 182.

Connecticut, to burn public buildings or State military stores, five years; to commit high crimes, five years; other conspiracies, one year, $300; G. S. (1888), §§ 1422, 1642.

Minnesota, three months and $100; G. S. (1894), § 6424.

Alabama, conspiracy to commit felony, six months and $1,000; to commit misdemeanors, three months and $500; Crim. Code (1896), §§ 4428-9, 5414.

Arkansas, conspiracies to overthrow State or intimidate courts, evidenced by some overt act of violence, one to fifteen years; other conspiracies, three months and $100; Ark. Dig. (1894), §§ 1505, 600, 601.

Florida, defined conspiracies, one year and $1,000; common law conspiracies, one year and $500; R. S. Fla. (1892), §§ 2593, 2370.

Georgia, conspiracy to cheat State or county, two to ten years; to indict an innocent falsely, who is accordingly indicted and acquitted, one to five years; misdemeanors, punishment not specified, six months and $1,000; 3 Code (1895), §§ 287, 118, 1039.

Idaho, conspiracies, one year and $1,000; Penal Code (1901), § 4686.

Indiana, "white cap" conspiracies, two to ten years and $2,000; to commit felony, fourteen years and $5,000; conspiracies to falsely indict, six months and $1,000; 1 R. S. (1901), §§ 2065, 2260, 2261.

Indian Territory, conspiracies to overthrow government or intimidate court, evidenced by forcible acts, one to fifteen years; other conspiracies, three months and $100; Stat. 1899, §§ 1164, 1165, 1167, 465r.

Kansas, to obstruct railroads, ninety days and $200; others, one year and $500; G. S. (1901), §§ 2376, 2106.

Kentucky, false prosecutions, twelve months and $100; Stat. 1899, § 1341.

Louisiana, to murder, rob, rape, commit burglary, arson, perjury and forgery, two years and $1,000; to

assault and drive from homes, one year and $1,000; Rev. Laws 1896, p. 215.

Maine, to indict falsely, five years, $1,000; to injure an individual or act injurious to public health, &c., three years and $1,000; R. S. Me. (1883), p. 916, §§ 17, 18.

Michigan, no statutory conspiracy, common law crimes, two years and $2,000; but see *in re* Lamphere. 61 Mich. 105.

Missouri, defined similar to New York, twelve months and $200; R. S. Mo. (1899), §§ 2153-4.

Montana, defined similar to New York, one year and $1,000; Code (1895), § 320.

Nebraska, conspiracy to indict, one year and $1,000; Comp. St. (1901), § 1675.

New York, defined at length; treasonable conspiracy against State, ten years; others, one year and $500.

Ohio, "white cap" conspiracy, two to ten years and $2,000; no common law crimes; 2 Bates. St. (1900). § 6895.

Oklahoma, defined similar to New York, one year and $500; Okl. St. (1893), § 2061.

North Dakota, defined as in New York, one year and $500; Penal Code (1899), §§ 7037, 6812.

New Jersey, defined similar to New York, two years and $500; 1 G. S., N. J. (1895), p. 1093, § 236.

Rhode Island, one year and $1,000; G. L., R. I. (1896), p. 1013.

South Carolina, conspiracy to prevent citizens from voting, &c.; Cr. Code (1902), § 233. No other statutory conspiracy. Common law offenses punishable by

jail sentence and fine in accordance with common usage and practice in the State.

Tennessee, defined as in New York, also common law conspiracies are misdemeanors, but no punishment seems to be prescribed. Conspiracy to indict one falsely of a felony, two to ten years; Code Tenn. (1896), §§ 6693. 6694.

Texas, defined to be an agreement to commit felony: conspiracy to murder, two to ten years; conspiracy to commit other felonies, two to five years; Penal Code (1895), §§ 957, 958.

Wisconsin, no statutory definition, one year and $500; 2 Saub. & B. Ann. St., § 4568.

Virginia, to incite negroes to violence, five to ten years; other conspiracies, jail and fine in discretion of court.

West Virginia, "vigilance committee," one year and $500; others, fine and jail in discretion of court.

Washington, not defined, one year and $500; Code (1896), §§ 5906, 6488.

Illinois, conspiracy to indict, one year and $1,000; to "boycott," to commit felony, &c., common law conspiracies, five years and $2,000; R. S. Ill., ch. 38, §§ 45, 46.

4. *The sentence was not due process because so severe that it raises the presumption that vindictiveness, passion and sectional hatred entered into the judgment of the trial court.*

Three men agree together, let us assume, to obtain the money of a certain liquor dealer named Garrett by means of false pretenses. One of the trio approaches this worthy man, and, pursuant to the agreement, makes certain false

representations to him. Garrett at once fathoms the scheme and calls the attention of his clerk to the departing schemer, saying: There goes "a genuine gold-brick "man" (312 Trans., 69). The plot became abortive from that moment; it never had the slightest chance of success. Thereafter, Garrett, instead of at once denouncing Howard to the authorities, tolled him on, encouraged him, prevented his backing out at the last moment (312 Trans., 73, 75-80, 85); all for the purpose of setting up a false and fraudulent claim to some $2,000 worth of property of defendants (312 Trans., 86, 87). So far as the crime of these appellants is concerned, it seems to be the very mildest conspiracy possible. It deceived no one; it never had the least chance of success; it began and ended in the mere agreement of the plotters; it died at birth. For this abortive attempt, two receive the tremendous sentence of ten years, the third seven.

Look now upon this picture! A man and a woman (presumably husband and wife) agree together to destroy the virtue of a seventeen-year-old girl. The devilish arts used are not disclosed, but the plot succeeds, and a young life is ruined. Only a credulous child's virtue is gone, only a girl's life wrecked. Surely this is but a venial sin; Garrett's dollars are safe, and so the offense being trivial, a trivial punishment will suffice. Two years for the man, nothing for the woman! This is the measure of justice which satisfied the Courts of North Carolina in the Powell case, *supra*. With right-thinking men an attack upon the virtue of a woman necessarily arouses righteous indignation which often hurries them to excess; and therefore had these sentences been transposed; had the destroyer of virtue been sentenced to ten years and the plotters for lucre and gain received two, most people

would say that justice had not gone astray; but, regarding the actual fact, it would seem clear that the passion was not aroused at the sight of a ruined child, but at the contemplation of men from Chicago going down to North Carolina with intent to defraud one of the citizens of that State of his money. Looking at the *sentences* in the respective instances alone, this is a fair conclusion. But there are other elements in this case pointing in the same direction. In spite of a positive law of the State commanding the trial judge to charge on the presumption of innocence, and to charge that such presumption is to be regarded as affirmative evidence of innocence in favor of the accused until overcome by proof of guilt beyond a reasonable doubt, in spite of the fact that such an instruction was specifically asked at the trial (312 Trans., 113, instr. XIV.), the Judge neglected and refused to so charge; and when the case was in the Supreme Court, the point was made and earnestly pressed (312 Trans., 133, Assgt. Error 14, 15). Yet the majority opinion included the error in the category of those exceptions that were "without merit" (312 Trans., 20).

Again, it has been decided in North Carolina that a defendant is entitled to a bill of particulars in a criminal case when the indictment is not specific. *State* v. *Brady*, 107 N. Car. 822, 827. In the case at bar such a bill was prayed and denied, exception taken and the point urged in the Supreme Court (312 Trans., 61, 62; Excep. 1, Tr., 122; Assgt. Error, 1). Defendants then went to trial on the three counts of the indictment, not knowing whether the State would attempt to prove a conspiracy to rob or one to defraud. (See indictment 312, Trans., 60, 61). At the close of the evidence for the prosecution, the State *"nolled"* the second and third counts and

elected to ask a conviction on the first, "the other counts "to be referred to as furnishing particulars" (312 Trans., 106). This charged merely a conspiracy by false pretenses to defraud one Paul Garrett, nothing more. The counts referred to as furnishing particulars charged, respectively, a conspiracy to assault and rob and a conspiracy to cheat and defraud by the false pretenses that the plotters owned certain gold bars, and *nothing more!* (312 Trans., 60, 61). Judge Clark, in the Supreme Court, said: "The particulars were fully furnished by the sec- "ond and third counts, * * * so that they (defend- "ants) were in full possession of all the information a "bill of particulars could have furnished them" (313 Trans., 15). Judge Douglas vigorously protests against this view (313 Trans., 22). Just how a count on a conspiracy to rob or one alleging the ownership of gold bars, could give any information as to the nature of the offense to defendants, the writer confesses his inability to fathom.

Yet again, in flat violation of the law of the State, the trial judge singled out the prosecuting witness, Garrett, while the panel was in the court room on the motion for the rule on the witnesses, and again in his charge, for commendation (312 Trans., 64, 119). Judge Clark evades the first exception by saying the statute applies only to the instructions to the jury; and is silent as to the special commendation of Garrett by the trial judge in his charge (312 Trans., 19). This latter objection was probably also "without merit;" though Judge Douglas had a strong opinion to the contrary (313 Trans., 23-27).

And again, after the arrest and hence after the conspiracy had fully ceased, all sorts of declarations and acts of the various defendants, in the absence of one or more

of them, were introduced (over objection) as evidence against the absent ones. For example, the card with Hawley's name (312 Tr., 93, 99, 100); the trunk check taken from Daley (Tr. 94); the contents of the trunk and of the case (Tr. 94, 95, 104); statements of Hawley, when arrested, and his attempt to destroy a certain letter (Tr. 100). This was in violation of the plainest rules of evidence, even in North Carolina. 3 Greenl. Ev., sec. 94; *State* v. *Dean*, 35 N. Car. 63; *State* v. *Collins*, 121 N. Car. 667.

We are well aware that some of these matters are not Federal questions, but they are recited to show that, law or no law, it was intended by the majority of the Court that this sentence should stand; and the manifest errors in the majority opinion, taken in connection with the heavy sentence, do show a passion, a prejudice against these defendants; and do further show that they were not convicted and punished by the "law of the land," as stated in the dissenting opinion of Judge Douglas.

After a long generation sectional differences are happily fading out in our country. Not the least benefit of the Spanish war is that it greatly hastened the era of restored mutual trust and confidence between the North and the South. In an entirely proper spirit, however, State pride is strong; and it is necessary, in our dual system, that it should continue to be so. Out of this feeling has grown of late years a system of reciprocity between States. This is particularly noticeable in legislation in several of the States respecting corporations, especially insurance companies, by which certain foreign corporations are accorded privileges, provided the corporations of the legislating state receive the same or like privileges

in the domicil of the foreign company. For an example, see Ills. Stat. Hurd's Rev., ch. 73, sec. 227.

Inseparably bound up in the notion of reciprocity is that of retaliation. Let any one State, through its courts and juries, systematically discriminate against the citizens of other States; even though those citizens be criminals, and retaliation will surely follow. This is a consummation most earnestly to be avoided. We submit this consideration should have weight with the Court.

5. *The sentence is not due process because our people are opposed to judge-made crimes, and tolerate them only when followed by mildest punishments.*

To a freeman nothing is more abhorrent than a system of laws which leave punishable acts undefined; and he is right, for nothing is more subversive of liberty. This was the main complaint against Star Chamber—this undefined, illimitable jurisdiction, which was not only unrestricted as to the nature and amount of punishment, but was bound by no pre-ascertained definition of offenses. An evidence of the feeling is the condemnation of Nero, grown into a proverb, for hanging his laws so high that they could not be read. That such is the general sentiment of the American people is shown by their legislation on this topic in the various States, elsewhere set out.

Fitz James Stephens in his History of Criminal Law (Vol. 3, p. 360, *et seq.*) very justly remarks that in a rude state of society, when legislation is scanty, it is inevitable that to the judges should be committed the power to declare new offenses; but in modern times practically all possible crimes have been defined, and should new circumstances arise, the legislature can promptly meet the emergency with a statute. To this may be added the

reflection that as a people advances in civilization and liberty, they become less and less tolerant of confiding to a single judge or even a bench any vague and undefined powers which may affect the security of the individual from arrest and punishment. In 1854 Mr. Justice Crompton, in his observations on the scheme for codification of the criminal law, advocated the retention by the judges of the power to declare new offenses. 3 Steph. Cr. L., 359. Certainly the learned justice was scarcely the person to ask such a power. In *Hilton* v. *Eckersley*, 6 E. and B. 47, some cotton spinners entered into a bond to work only as the majority should decide. Crompton, J., thought the agreement was an indictable conspiracy. Lord Campbell, C. J., could not bring himself to believe that such an agreement to raise wages, unaccompanied with any design to use violence, was an offense. This was in 1856. Had the workmen been tried before Crompton, they would have gone to jail; Lord Campbell would have discharged them. In United States Courts, in New Hampshire, Massachusetts, New York, Michigan, Maine, Vermont, Iowa, Kentucky and Pennsylvania it is not a crime to combine to defraud by false pretenses, unless the pretenses consist of false weights, measures or tokens or some other means *criminal* in themselves.

State v. *Parker*, 43 N. H. 83; *Comm.* v. *Eastman*, 1 Cush. 189; *Comm.* v. *Wallace*, 16 Gray 221; *Lambert* v. *People*, 9 Cow. 578; *Alderman* v. *People*, 4 Mich. 414; *People* v. *Barkelow*, 37 Mich. 455; *State* v. *Mayberry*, 48 Me. 219; *State* v. *Stephens*, 30 Iowa 391; *Hartman* v. *Comm.* 5 Barr. 60; *Comm.* v. *Ward*, 92 Ky. 158; *State* v. *Keach*, 40 Vt. 113; *U. S.* v. *Walsh*, 5 Dill. 58.

On the other hand the States of Illinois, Maryland, New Jersey and others hold that combination to cheat

and defraud by whatever means is criminal. *Cole* v. *People*, 84 Ill. 216 (with a vigorous protest from Scholfield and Dickey, J. J., the former one of the ablest of the Illinois judges); *State* v. *Buchanan*, 5 Har. and J., 317; *State* v. *Cole*, 10 Vroom 324.

"Under which King, Bezonian!" All these courts profess to declare the same common law, though they differ radically as to what that law is; and yet the layman must know *in advance* what a particular court will decide, at his peril of a jail, or in North Carolina, a penitentiary sentence! When the punishment for the judge-made crime is slight, such as a small fine or a short jail sentence, we may be content to permit the practice to continue, but when in such cases a ten-year penitentiary sentence may be awarded—this must give us pause.

In several of the States conspiracy is defined and the statutes expressly declare that no other combinations shall be deemed criminal. In none of the acts, be it observed, is the judge-made conspiracy to do an *unlawful* act, or a lawful act by *unlawful* means, included.

Conspiracies defined, and no combinations other than such are punishable.

Arizona, Penal Code, § 3.

California, Penal Code (1899), § 182.

Minnesota, Genl. Stat. (1894), § 6424.

Montana, Code (1895), Penal Code, § 322.

New York, Penal Code (1900), § 170.

North Dakota, Penal Code (1899), § 7039.

No crimes except statutory. Common law crimes not punishable.

Arizona, Penal Code, § 3.

California, Penal Code (1899), § 6.

Georgia, there appears to be no common law crimes.

Indiana, 1 R. S. Ind. (1901), § 237.

Montana, Code (1895), § 6.

Nebraska, apparently none but statutory offenses.

Ohio, no common law offenses, *Mitchell* v. *State*, 42 Ohio St. 383.

Oklahoma, Stat. Okl. (1893), § 1838.

North Dakota, Penal Code (1899), § 6801.

Texas, Penal Code (1895), § 3.

The objections to judicial legislation are many and serious. The principal ones are admirably summed up by Austin in his Jurisprudence, Lect. 39, part 1: First, the difficulty in deducing, from the vast mass of adjudicated cases, the true *ratio decidendi*, and as a corollary, the necessary ignorance of the entire laity of the rule of law which they are conclusively presumed to know; *second*, many of these rules, from the nature of the case, are laid down in haste, for often the *nisi prius* judge must announce them; *third*, a new rule is always *ex post facto* or retroactive as to acts done prior to the time of its first enunciation; *fourth*, there is no test of the validity of a rule announced from the bench. It may be and frequently is overruled or modified by subsequent judicial decision. An act may be innocent to-day, criminal to-morrow; or criminal to-day and innocent to-morrow. It must be conceded that if all our criminal law thus rested in the bosom of the judge, the situation would be intolerable. That any portion of it so rests is a difference in

degree only, and is subversive of liberty and un-American to the extent that it rests in judicial discretion.

In his Civil Government, Locke says: "For all the "power the government has being only for the good of "society, as it ought not to be arbitrary and at pleasure, "so it ought to be exercised by established and promul- "gated laws, that both the people may know their duty, "and be safe and secure within the limits of the law, "and the rulers, too, kept within their due bounds." Locke, Bk. II., ch. 10, § 137.

The earliest reference we have found to the principle that all laws ought to be promulgated and known before one should be punished for their infraction is in Domat (Vol. 1, § 16). He cites as his authorities *9 Cod. de legibus; 12 Cod. de jur. et fact; § 1 in fin. in prooem. Inst.; 2 Cod. de in jus voc.* Doubtless the references do not support the text, for the extraordinary jurisdiction of the judge in Imperial Rome was not consistent with the proposition. However, the statement is valuable in this that it expresses the sentiment of the ablest continental lawyer of the 17th century, and Domat's text, without doubt, has had no little influence in bringing about the condition which now obtains in all European states whereby there are no crimes except those defined by statute.

In the Penal Code Napoleon of 1810, Art. 4, it is provided: "No contravention, no delict, no crime can be "punished (punis de peines) which has not been promul- "gated (prononcé) by law before its commission."

All the newer codes of Europe, as above stated, recognize the doctrine that there can be no punishment inflicted

except for a crime previously defined by legislation. (See Dr. Hammond's note J to Lieber's Hermenentics.)

The danger of manufacturing new crimes which are within the "reason," but not the language of the statute is well pointed out by Mr. Ch. J. Marshall, in Wiltberger's case, 5 Wheat. 76, 96. A strong expression to the same effect is found in the opinion by Mr. Justice Washington in *U. S.* v. *Sheldon,* 2 Wheat. 119, 121. See also opinion by Taney, Ch. J., in *U. S.* v. *Morris.* 14 Pet. 464. 475; and No. 62 of the Federalist.

In some of the colonies the principle that no act was criminal save those enumerated by the statute or expressly provided for in the Word of God was early adopted. Massachusetts. See Body of Liberties, p. 1, Hutchinson, State Papers, 205. The common law of England is not mentioned. In Connecticut the Code of 1642 is copied from that of Massachusetts. Conn. Records, I., 77. In New Haven Divine law was the original guide in civil and criminal matters, not the common law. 1 New Haven Records, 1. In Rhode Island a Code was adopted in 1647, set out in full in 1 Arnold, Hist. R. I., 205. Crimes were defined, and it was provided that "in all other "matters not forbidden by the Code all men may walk as "their conscience persuades them."

The modern sentiment is well shown in the following extract from the opinion in the Matter of Lamphere, 61 Mich. 105; 108. Campbell, C. J. (one of the ablest of western judges) remarks: "And while we have kept in "our statute books a general statute resorting to the com- "mon law for all non-enumerated crimes, there has always "been a purpose in our legislation to have the whole "ground of criminal law defined, so far as possible, by

"statute. * * * The punishment of all undefined "offenses is fixed within named limits, and beyond the "unregulated discretion of the court." And again on p. 109: "Whatever elasticity there may be in civil matters, "it is a safe and necessary rule that criminal law should "not be tampered with except by legislation."

There is no doubt that this last statement expresses the sentiment of the American people, for it commends itself particularly to their sense of justice and their desire for security.

6. *The trial was not due process because the judge below refused to charge on the presumption of innocence.*

In *State* v. *Heaton*, 77 N. Car. 505, 508, it is said: "As men do not generally violate the criminal code, the "law presumes every man innocent, and this presumption "of innocence is to be observed by the jury in every case."

This instruction was asked and refused by the Court, no reason being assigned; and, worse still, the charge implies that no such presumption exists.

Independent of an express decision, this Court has drawn a sharp distinction between "presumption of inno- "cence" and "reasonable doubt;" and holds that both are necessary elements in a criminal case for the proper legal protection of the accused. The former is considered to be affirmative evidence in the defendant's favor; the latter a burden cast upon the prosecution. Each is, in a manner, the correlative of the other. Estimated quantitatively, if the presumption be neglected, a very small amount of proof might overcome, in the minds of the jury, the reasonable doubt of guilt; but put the presumption in the scales, in turn the slight proof is overcome, and more evidence of guilt becomes necessary on the

part of the prosecution. It is plain, therefore, that the presumption is a vital matter for the accused in every criminal case. That such a presumption exists in our criminal law is, as this Court say: "Axiomatic and ele-"mentary, and its enforcement lies at the foundation of "the administration of our criminal law." Again, the principle is called "vital and fundamental" and a warning is thrown out that it "be not denied, when requested, "to any one accused of crime."

Coffin v. *U. S.*, 156 U. S. 432.

The writer is well aware of the polemical and somewhat acrimonious criticism by the late Professor Thayer of the distinction taken in this case; but a careful perusal of his essay serves only to make the distinction more apparent and the application of the rule the more necessary, so long as we adhere to the doctrine that the presumption exists and is a legal right of an accused. See Thayer Prelim. Tr. Ev. Appendix B.

The Coffin case was explicitly affirmed on this point by this Court in *Cochrane* v. *U. S.*, 157 U. S. 286, 292; and *Kirby* v. *U. S.*, 174 U. S. 47, 55; and is referred to with approval in *Allen* v. *U. S.*, 164 U. S. 492; *Agnew* v. *U. S.*, 165 U. S. 36.

If, as said in the opinion in the Coffin case, the presumption of innocence is "vital and fundamental," it comes within the express language of the cases of *Brown* v. *New Jersey*, 175 U. S. 172; *in re* Kemmler, 136 U. S. 436; and *Hurtado* v. *State*, 110 U. S. 516, more fully cited in subdivision 7 *infra*. A denial of such a right by any instrumentality of a State, therefore, is a denial of due process of law.

Moreover, in this particular case, it is a discrimination against these appellants; for the law of North Carolina, as shown, prescribes that trial courts must, when requested, charge on such presumption. A refusal so to do, on request, is to deny the particular defendant the equal protection of the laws. It will not do to say that full instructions were given the jury in this case on reasonable doubt, for, as shown above, and as expressly held in the Coffin case, the two are not equivalent terms; and that a defendant may have that full measure of justice given him which the law commands, the charge to the jury must embrace both propositions.

7. *The indictment charges no offense whatever. It is therefore* (a) ***not due process of law; and*** (b) ***it is a denial of the fundamental right of every American citizen to be informed of the nature of the accusation against him.***

(a) It is not due process of law.

Conceding for the sake of argument that at common law there are various combinations outside of the Edwardian Statutes which are criminal; conceding that among them is the offense of conspiring by certain kinds of false pretenses to cheat and defraud another; yet this indictment fails to change any such offense, and a conviction thereon is not due process of law.

We are well aware of the line of decisions of this Court which hold that the Federal Courts will not interfere with State rulings in matters of procedure, or in matters touching the frame of the indictment, or a change in the constitution of a State Court, or a change in the jury system, or the abrogation of the grand jury. These are but matters of form covered by local statutes. But the question

here involved lies deeper and is far more serious. "An "illustration is no argument," says Tristram,—"nor do I "maintain the wiping of a looking-glass clean to be a "syllogism;—but you all may, if it please your worships, "see the better for it." As an illustration, then, suppose a citizen of the United States were indicted for imagining the Governor's death and the State Supreme Court were to decide that the offense was covered by the usual statute defining murder, and sustain a death sentence; or suppose an indictment charging murder generally, with no time, place, weapon, intent, malice or prepence or name or description of the person killed alleged; would this Court hold either "due process of law?" Strip the count of this indictment on which defendants were convicted of its verbiage, and it charges simply a conspiracy by false pretenses to cheat and defraud Garrett. Even Judge Clark admits this insufficient for he concedes that defendants were entitled to a bill of particulars (312 Tr., 17), and states what is not in accordance with the truth or the facts in the record that defendants "were in full "possession of all the information which a bill of particu- "lars could have furnished them." Let us pause for a moment to examine this statement. The first count charges a conspiracy to cheat Garrett by false pretenses, and no more; the second, a conspiracy to assault Garrett, put him in fear of his life and thus feloniously "to steal, "take and carry away" his money from his person; the third, a conspiracy to cheat and defraud Garrett by the false pretenses that defendants owned mining interests and "large blocks of gold," *nothing more*. The last two counts were *nolle prossed*, with the reservation that they might "be referred to as furnishing particulars" (312 Tr., 106). The evidence was all directed towards proving

the notion that the combination was to defraud Garrett by some undefined false representations; the theory of robbery was not touched on; and the facts adduced fairly considered, were entirely consistent with the theory that the plan was to persuade Garrett to come into the combination and afterwards to cheat some one else. Now, under such circumstances to say that the two counts *nolled* gave defendants full information is a ruling:

> "That palters with us in a double sense,
> That keeps the word of promise to our ear,
> And breaks it to our hope."

It is simply not true that defendants had full information, as Judge Clark says; and as to this, we put ourselves upon the record. How, then, were defendants apprised of the charge against them? Not by the indictment and not by the bill of particulars, so-called.

Were they to prepare to meet a conspiracy to assault and rob Garrett? If the second count furnished the particulars, then were they tricked, not by the State's solicitor, but by the Court itself. If they relied on the third count, then no false pretenses whatever were set out, and no defense necessary, and again they were tricked.

The Constitution of North Carolina provides: "In all "criminal prosecutions, every man has the right to be "informed of the accusation against him." Art. I., sec. 11. By § 1183 (1 Code N. Car., 1883) it is provided: "Every criminal proceeding by warrant, indictment, in- "formation or impeachment shall be sufficient in form for "all intents and purposes, if it express the charge against "the defendant in a plain, intelligible and explicit man- "ner; and the same shall not be quashed, nor the judg-

"ment thereon stayed, by reason of any informality or "refinement, if in the bill or proceeding sufficient matter "appears to enable the Court to proceed to judgment."

On the one hand it is plain that the indictment does not fulfill the constitutional provision; nor, on the other, is it cured by § 1183, *supra.*

The rule of law, now believed to be universal in this country and England, is that an indictment charging a conspiracy to cheat and defraud, without more, is fatally defective; or else so defective as that a bill of particulars is matter of right and it is fatal error to refuse it. *King* v. *Gill,* 2 B. and Ald. 204; *Rex* v. *Hamilton,* 7 C. and P. 448; *State* v. *Parker,* 43 N. H. 83; *Comm.* v. *Eastman,* 1 Cush. 189; *Comm.* v. *Wallace,* 16 Gray 221; *Lambert* v. *People,* 9 Cowen 578; *Alderman* v. *People,* 4 Mich. 414; *People* v. *Barkelow,* 37 Mich. 455 (Cooley, C. J., and Campbell, J., were then on the bench; and the opinion contains a strong statement by the latter as to the reasons on which such vague pleading is condemned). *State* v. *Stevens,* 30 Iowa 391; *Hartman* v. *Comm.,* 5 Barr. 60; *Williams* v. *Comm.* 34 Pa. St. 178. (In this last case the fustian indulged in by some most respectable Courts about the secrecy of the offense and other mysterious and esoteric qualities is exposed. The offense "can be as readily "*laid* as proved," says the Pennsylvania Court.) *State* v. *Crowley,* 41 Wisc. 271; *State* v. *Cardoza,* 11 S. Car. 195; *State* v. *Mayberry,* 48 Me. 219; *U. S.* v. *Walsh,* 5 Dill. 58. (In this case Judge Dillon gives an excellent review of the cases, and repudiates the English doctrine as announced in the Gill case, *supra.*) *Comm.* v. *Ward,* 92 Ky. 158; *State* v. *Keach,* 40 Vt. 113.

In those jurisdictions where the vague indictment is

upheld, a bill of particulars is awarded. *McDonald* v. *People*, 126 Ill., 150; *State* v. *Brady*, 107 N. Car., 822.

The argument that this Court will not consider as Federal any question which involves a State's ruling on its internal police will doubtless be urged. There is no adjudication by this Court either for or against the proposition, on the application of a non-statutory *general rule of substantive criminal law* of the several States considered in connection with the inhibition of the XIV. Amendment. The rulings thus far are only on the *adjective*, and substantive law embraced in statutory enactments and the interpretation thereof by State tribunals. As to these the Court say there are no Federal questions, since each State is supreme in that province. But a strong argument can be made from analogy. And first let it be noted that this Court is and always has been sedulous to protect citizens of the United States in their *property* rights against unwarranted encroachments by the States. We need do no more than refer to the exhaustive opinion of Mr. Justice Brewer in *Cotting* v. *Godard*, 183 U. S. 79. Will the Court be less solicitous to protect a citizen's liberty than his property? "Next in degree to the right of per-"sonal liberty is that of enjoying private property without "undue interference or molestation," says Mr. Justice Harlan in *Chicaga, B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, quoting from Broom Const. Law, 228. The English law has at times been much criticised for placing a higher value on mere property than on life or liberty; our Court puts the matter on the right basis.

Now, regarding mere property rights this Court has refused to follow State adjudications on the rules of Equity, on the rules of the Law Merchant, on the prin-

ciples of Admiralty Law. *Bucher* v. *Cheshire R. R.*, 125 U. S. 555; *Swift* v. *Tyson*, 16 Pet. 1; and numerous other cases.

In *Boyce* v. *Tabb*, 18 Wall. 546, it was held that contracts relating to slaves, valid when made, are nevertheless valid though afterwards held void by the Supreme Court of the State as against public policy. The Court say in effect that the provisions of the Judiciary Act do not require Federal Courts to follow State decisions on such questions. Those provisions do not apply to questions of "a general nature, not based on a local statute "or usage, nor on any rule of law affecting titles to land, "nor any principle which had become a settled rule of "property." The State decisions on the excepted matters are highly persuasive, but not conclusive.

In *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555, Mr. Justice Miller comments on and defines § 721 of the Judiciary Act, and states there is nothing in the act which requires Federal Courts to follow State decisions on questions of equity or admiralty. The learned Justice cites *Swift* v. *Tyson*, 16 Pet. 1, which makes the same ruling as to the general principles of commercial law. The classes of cases in which he says the Federal Courts are bound by State decisions include all interpretations of State constitutions and statutes; decisions, whether founded on statutes or not, which have laid down rules of property; decisions establishing rules of evidence; and the common law, in actions at law. As to this last, the Court say, difficulties arise.

"It may be said generally that wherever the decisions "of the State courts relate to some law of a local char- "acter which may have become established by those

"courts, or has always been a part of the law of the State, "that the decisions upon the subject are usually conclu- "sive, and always entitled to the highest respect of the "Federal courts."

There is nothing in the language of sec. 721 of the Judiciary Act which holds the Federal Courts bound to follow State decisions on general principles of the common law of crimes; and there are assertions of principles by this Court in various cases which go far to show that it will not be bound by such decisions.

In *Swift* v. *Tyson*, 16 Pet. 1, the Court makes the well-known distinction between statutory law and the law as announced by the courts; the latter being only the evidence of what the laws are, and if found defective or ill-founded, may be reëxamined and a different rule announced. Considering then sec. 34 (now § 721) of the Judiciary Act, the Court say that the true interpretation of that statute is that it embraces only the statutory laws of the given State, the interpretations thereof by its courts, and to rights and titles to immovables. To these enumerated classes the term "State laws strictly local" is applied; as to all others the reasoning of the Court leads to the conclusion that the Federal Courts are not at all bound by State adjudications. It would seem to follow necessarily from this that if there is any such thing in Anglo-Saxon law as a general principle of criminal law, this Court is not bound by the decisions thereon of the State tribunals. There are many decisions of this Court holding that while there is no such thing, strictly speaking, as a common law of the United States, yet when an Act of the Congress uses a term of common law origin, the courts of the United States will have recourse to the common law for a definition of such term.

If there be a question of murder on the high seas, the courts of the United States look at once to the common law for the ingredients of murder, and they find there that there must be intent, malice prepense, deliberation. If the question be the negotiability of a bill of exchange, recourse is had to the law merchant for the requisites of negotiability. Is the one a more general principle than the other? If the State Court should hold a transfer of a bill of exchange in good faith, for value and without notice before maturity did not pass title, this Court would decline to follow the ruling. Is it any more bound in the absence of a State statute to follow an erroneous ruling on a general principle of criminal law?

The point here insisted on is that the indictment in this case charges a criminal conspiracy; but there is no State statute defining that offense, and hence the State Courts of necessity must go to the common law for the definition, and the indictment must contain all the essential ingredients of the crime, as there defined. Admitting for the moment that a conspiracy to cheat and defraud by false pretenses is a common law crime, then the State must allege that crime in terms of the common law. By all the authorities, either in the indictment or the particulars furnished the defense when demanded in apt time, the prosecution must set out the false pretenses, and they must be either false weights or false measures or false tokens, or else no crime whatever is charged. The State in this instance has failed to charge a common law crime in terms of the common law; and hence it has charged no crime at all. If it has charged no crime at all, then this prosecution is not due process of law.

(b) It is a denial of the fundamental right of the citi-

zen to be informed of the nature of the charge against him.

But a far stronger reason exists why this Court should, on this branch of the case, discharge the prisoners.

In failing to charge any crime in the indictment and in incarcerating defendants below on a sentence based on such defective indictment, the State has invaded the fundamental right of the citizens of the United States to be informed of the accusation against them, and has, in addition, deprived them of their right not to be a second time put in jeopardy for the same offense.

Under the vague allegation of "false pretenses" in this indictment, how could defendants prepare their defense? A hundred different changes might be rung on the false pretenses. And, more important still, how could defendants plead former conviction. Suppose a new indictment to be framed on a conspiracy to cheat Garrett by selling him a salted mine; or by selling him bars of copper as and for gold bars, the conviction in this case would be no bar to either. Is it not a fundamental right of every American citizen that he shall not twice be tried for the same offense? And this irrespective of State or Federal Constitutions or Statutes? Does not this proposition come fairly within the ruling of this Court in *Loan Ass'n.* v. *Topeka*, 20 Wall., 655, 662? No court has gone further than this Court in upholding the rule of pleading which requires an indictment to fully state the crime, so that defendant may be apprised of the accusation against him, and be ready to meet a second charge for the same offense. *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Mills*, 7 Pet., 138. In *U. S.* v. *Cook*, 17 Wall., 168, this Court say: "Every ingredient of which the offense is "composed must be accurately and clearly alleged."

Is the State absolutely omnipotent in criminal matters within its boundaries? If so, it is a strange omission in our Federal Constitution. Property rights are carefully guarded from arbitrary action by the State, but the lives and liberty of citizens of the United States are absolutely at its mercy. If this be true then a State may lodge in its chief executive the power to issue *lettres de cachet;* it may re-establish the ordeal, the wager of battle, amputation of members, the old punishment for high treason, the *peine forte et dure;* the only limitation being that all alike must be subject to the new laws.

We submit this cannot be the law; and we are not without cogent authority and reason on the subject.

In *Brown* v. *New Jersey,* 175 U. S., 172, it was held that a trial of a defendant in a criminal action in a state court by a struck jury is not a violation of XIV. Arndt. and is due process of law.

"The state has full control over the procedure in its "courts, both in civil and criminal cases, subject only to "the qualification that such procedure must not work a "denial of fundamental rights or conflict with specific and "applicable provisions of the Federal Constitution." By Mr. Justice Brewer, citing *ex parte* Reggel, 114 U. S., 642; *Iowa C. R. Co.* v. *Iowa,* 160 U. S., 389; *Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 258.

The Court here makes two classes of rights, namely: "fundamental rights" and rights secured by the express language of the Federal Constitution. In other cases similar language is used. *In re* Kemmler, 136 U. S., 436, the Court speaks of "those fundamental principles of "liberty and justice which lie at the base of all our civil "and political institutions." This statement is made in

a criminal cause and in reference to the liberty of a citizen. The language is taken directly from the leading case of *Hurtado* v. *State*, 110 U. S., 516. In this last case, the Court quotes with approval the celebrated opinion of the late Mr. Justice Miller in *Loan Assn.* v *Topeka*, 20 Wall., 655, 662. There are certain rights, says that learned jurist, "in every free government beyond the "control of the state. A government which recognized "no such rights, which held the lives, the liberty and the "property of its citizens subject at all times to the abso- "lute disposition and unlimited control of even the most "democratic depository of power, is after all a despot- "ism."

In *Holden* v. *Hardy*, 169 U. S., 366, it is said: "This "Court has never attempted to define with precision the "words 'due process of law,' nor is it necessary to do so "in this case. It is sufficient to say that there are certain "immutable principles of justice, which inhere in the very "idea of free government, which no member of the Union "may disregard, as that no man shall be condemned in "his person or property without due notice, and an op- "portunity of being heard in his defense."

What are these "immutable rights," these "fundamental rights," which lie at the base of all our * * * institutions?" Unquestionably this Court will not attempt any precise definition, but will properly leave each case to be decided on its special facts. But it is submitted that one of those rights is the right of every man to be told of the nature of the charge against him. Can a state deprive a man of this right? If so, then as pointed out above, a state can punish a man as often as it pleases for the same offense. There is no escape logically from

this conclusion. It will not do to answer this by saying the state rule bears on all alike; for we invoke a different principle; we invoke the principle that every man, woman child in this broad Union, citizen, denizen or alien, has the indefeasible right to be informed of the accusation against him or her, and to be protected from further prosecution for the same offense by the plea of former conviction or former acquittal.

Perhaps these rights are included within the "priv-"ileges and immunities of citizens of the United States." No precise definition of this phrase has been attempted, but in numerous decisions this Court has enumerated certain of these "privileges," while in other cases it has held certain claimed rights not to be within the meaning of the provision.

In *Maxwell* v. *Dow*, 176 U. S., 581, it was held that the rights secured by the first eight amendments to the Federal Constitution were not necessarily privileges and immunities of citizens of the United States, as such; and hence these rights are not carried bodily into the 14th Amendment and thus made effective as against the several states. As to what these privileges and immunities consist in, the opinion quotes very largely from the Slaughterhouse Cases, 16 Wall., 36, and from the opinion of Mr. Justice Washington in *Corfield* v. *Coryell* (4 Wash., C. C., 371; S. C. Fed. Cas. No. 3230). Without attempting to define all these "privileges" Mr. Justice Miller enumerates the following: Free ingress and egress to and from any state; all privileges of trade and commerce allowed the citizens of any state; all privileges that are *fundamental*, which belong of right to the citizens of all free governments, and which have at all times

been enjoyed by the citizens of the several states, including protection by the government, the enjoyment of life and liberty with the right to acquire and possess property and to pursue and obtain happiness and safety, subject to state provisions for the general good; to go to the seat of government and assert claims or transact business; to seek the protection of the government; to share its offices; free access to seaports and to its various offices throughout the country; access to the courts of the several states; protection of the government on the high seas or within the jurisdiction of foreign governments; to assemble peaceably with others to petition for redress of grievances; the right to the writ of habeas corpus; to use navigable waters of the United States within state limits; rights of citizens secured by treaty; to become a citizen of any state; rights secured by Amendments XIII. and XV.; to bring actions in state courts; to keep and bear arms to the extent necessary to preserve to the federal government its resource to maintain the public security.

Per contra, the following have been held not to be such privileges and immunities; to practice law in state courts; women suffrage; trial by jury in state courts in suits at common law; the rights reserved by the Fifth and Sixth Amendments, since these are not rights peculiar to citizens of the United States, but are secured to all persons irrespective of citizenship; the property right to take fish in the waters of a state; indictment by grand jury or trial by jury, as at common law, in criminal cases; the prohibition of cruel and unusual punishments; for the state to adopt rules of judicature different from the course of common law, provided those rules are uniform as to classes (not purely arbitrary) in the state.

Maxwell v. *Dow, supra; Bradwell* v. *Illinois*, 16 Wall., 130; *Minor* v. *Happersett*, 21 Wall., 162; *Cole* v. *Cunningham*, 133 U. S., 107; *Blake* v. *McClung*, 172 U. S., 239; *U. S.* v. *Cruikshank*, 92 U. S., 542; *Re* Kemmler, 136 U. S., 436; *Walker* v. *Sauvinet*, 92 U. S., 90; *Doe ex dem. Murray* v. *Hoboken, etc.*, 18 How., 280; *Presser* v. *Illinois*, 116 U. S., 252; *O'Neil* v. *Vermont*, 144 U. S., 323; *Thorington* v. *Montgomery*, 147 U. S., 490; *Missouri* v. *Lewis*, 101 U. S., 22.

Again we meet the expression "privileges that are fun- "damental, and which have at all times been enjoyed by "the citizens of the several states, including * * * "the enjoyment of life and liberty * * * subject to "state provisions for the general good." Thus on the one hand as protected by the XIV. Amendment we have certain constitutional and certain additional rights which are fundamental, and these are protected; on the other, we see certain forms of procedure and certain limitations on the Federal Government which are not the peculiar privileges of its citizens, and these are not protected.

By pursuing this other route, we have arrived at the same destination. Is the right to be informed of the nature of the accusation against one "fundamental"? In this right is inextricably bound up that other right that no person shall be twice tried for the same offense. Is not this a fundamental right? These defendants were denied such rights by the Courts of North Carolina. Will this Court uphold that denial?

An argument "on the inconvenience" may be urged against this Court entertaining this case; and it may be said that such action would open wide the doors of Federal Courts to all defendants in state prosecutions. Not

so. So unique a case as this may not arise again in half a century. The criminal law in practically all the states is reduced to a code. The few common law offenses are almost entirely classed as misdemeanors punishable with short jail sentences or small fines. The chance of another case presenting the questions here invoved is practically nil. But even were it not so, inconvenience cannot prevail against the law.

All of which is respectfully submitted.

FRANK P. BLAIR,
LESLIE A. GILMORE,
Attorneys for Appellants and Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

44 and 45.

HOWARD ET AL. *vs.* NORTH CAROLINA

AND

HOWARD ET AL. *vs.* FLEMING, ETC.

Reply Brief of Plaintiffs in Error and Appellants.

MAY IT PLEASE THE COURT: We submit that defendant and appellee have not touched our main contentions.

We do not insist on the errors assigned as to the grand and petit juries, and this disposes of just half of the briefs in answer to ours.

COUNSEL ASK: "CAN THIS PROCEEDING BE MAINTAINED?"

We answer, most certainly; and confidently refer to the case cited by themselves, namely, Davis *vs.* Burke, 179 U. S. 399.

Second Error Assigned.

Appellee and defendant in error are wrong as to their presumption that "this is a mere repetition of the first assignment of error." We are not here objecting "to the finding of facts by the State courts." Our objection is that the indictment stating no crime is not due process of law. It is not claimed that the court's action below is "an erroneous ruling on a defective indictment," but that there is in this

case no indictment at all; the paper called an indictment might as well have been blank.

Is this due process of law?

There is no question here as between an indictment and an information; and counsels' suggestion on that point is irrelevant.

Finally, counsel state under this head that "the question as to whether or not an indictment charges a crime under the laws of a State does not present a Federal question."

We beg to differ with counsel on this statement. An indictment which charges no offense and upon which a citizen of the United States is convicted certainly is not due process of law.

The following are the cases cited by defendant and appellee to sustain their contention:

Caldwell *vs.* Texas, 137 U. S., 692.

On an indictment for murder under the Texas statute the charge was that with force of arms in a certain county in the State of Texas the defendant unlawfully and with express malice aforethought killed the deceased by shooting him with a gun.

The Federal question was not raised until the motion for rehearing in the Court of Appeals, which motion set out that the indictment did not contain a valid charge of murder under the Fourteenth Amendment. The motion was overruled.

This court held on a writ of error that the construction by the Court of Appeals of Texas of its statutes and the sufficiency of the indictment thereunder presented nothing "special, partial, or arbitrary, or in violation of fundamental principles."

The writ was dismissed.

Davis *vs.* Tex., 139 U. S. 651:

Plaintiff in error was indicted for murder in the same language used in the Caldwell case above.

The Caldwell case was affirmed as to the sufficiency of the indictment, and it was also ruled that the refusal of the trial court to continue the cause presented no Federal question.

In this case it was also ruled that the Federal question can not be raised for the first time in this court.

In the opinion in this court the language of the Texas Court of Appeals is quoted with approval, in which it is stated that the omission of the trial judge to charge the jury as to the second degree of murder is not error unless counsel pray such charge and the prayer is refused. The fair implication from the opinion of this court is that had the trial court so refused to charge and a proper objection made in the Texas court, such refusal would be violation of our Fourteenth Amendment, and this court would have reversed the case on error.

If we are right in this deduction, then it must necessarily follow that the refusal of the North Carolina court to charge on the presumption of innocence when and as requested, was within the inhibition of the Fourteenth Amendment.

In O'Neil *vs.* Vermont, 144 U. S. 323, it was ruled among other points that because the plaintiff in error did not present his Federal question below it was too late to present it in this court.

Mr. Justice Field and Mr. Justice Brewer dissented on the ground that while the Federal question was not specifically and by name raised below, nevertheless it necessarily appeared from the facts themselves as being an interstate commerce question.

The implication from the entire case is that had the Federal question been raised, the case would have been reversed because of the barbarity of the punishment (see page 339).

In respect of the punishment it is quite on all fours with the case at bar.

Bergemann *vs.* Backer, 157 U. S. 656, is not in point.

Third Assignment of Error.

Counsel state this assignment to be on the refusal of the trial judge to charge on the presumption of innocence, and insist that the court's charge on reasonable doubt covers the presumption.

It is sufficient to say that this court has ruled in the cases cited in our opening brief that the two are not interchangeable terms, and that the presumption is not once mentioned in the charge. We requested the charge, excepted to its refusal, and presented it below and now present it as a denial of a fundamental right of defendants below, and hence a Federal question.

Fourth Assignment of Error.

This assignment is on the severity of the sentence.

Counsel say there is no fact in the record to support this contention.

It is stated in the petition for the writ and emphasized in the traverse to the return that this sentence was far harsher than any ever inflicted for the like offense in North Carolina. The case went to the court on what was equivalent to a demurrer to the traverse, whereby the allegations stand admitted.

Moreover, we have produced and cited in our opening brief every case of the Supreme Court of North Carolinia in which the punishment for a conspiracy has been set out. These citations amply sustain our contention.

Next counsel contend that the Mallet case, 125 N. C., forecloses defendants below as to the construction of section 1097 of the North Carolina Code. We contend that that section has nothing to do with this offense; which, if an offense at all, is a common law misdemeanor punishable only by fine and jail sentence.

If our contention here be true, then the case of In re Bonner, 151 U. S. 242, is in point.

Counsel further say that the punishment is not cruel nor

unusual as a Federal constitutional question, and cite O'Neil *vs.* Vermont.

We submit that if the sentence is cruel or unusual, under State *vs.* Driver, 78 N. C. 423, then defendants below did not have the equal protection of the law.

Finally, under this head counsel make us say the punishment is violative of the Eighth Amendment. We make no such contention.

We do contend, however, that there is an unwritten law of these United States which forbids any State to inflict an inhuman, barbarous, cruel, or unusual punishment on any citizen of the United States.

For example, suppose the State of North Carolina should attempt to revive the horrid punishment anciently used in England for high treason; would this court permit its execution on a citizen of the United States?

Listen to its terms: In Twyn's case, 6 How. St. Tr. 514, a printer who published a book containing doctrines less violent than certain statements recently printed in Nebraska, was indicted for high treason and found guilty. His sentence was (p. 535) by Ch. J. Hyde:

> "That you be led back to the place from whence you came, and from thence to be drawn upon a hurdle to the place of execution, and there you shall be hanged by the neck, and, being alive, shall be cut down, and your privy members shall be cut off, your entrails shall be taken out of your body, and, you living, the same to be burnt before your eyes; your head to be cut off, your body to be divided into four quarters, and your head and quarters to be disposed of at the pleasure of the King's majesty. AND THE LORD HAVE MERCY UPON YOUR SOUL."

Fifth Assignment of Error.

Appellee and defendant under this head contend that the decision of the State court as to whether or not a certain act is a crime in the State is conclusive upon this

court. We submit that this court has never decided the question as broadly as claimed. On the contrary, the court has gone quite in the other direction. In *ex parte* Virginia, 100 U. S. 339, it was held the inhibition of the Fourteenth Amendment applied to all the State instrumentalities of government. In Siebold's case, 100 U. S. 371, it was held on *habeas corpus* that an act of Congress was void, and Bushell's case, 6 Howell's St. Trial, 999, was expressly approved.

The reasoning, in the opinion by Mr. Justice Bradley, applies as well to State as to United States statutes, and it is a logical conclusion that if punishment had been awarded by a State court under a statute clearly void, this court would discharge the prisoner even though the State courts had held the statute valid. *A fortiori* then should this court overturn a wrong decision on a question of a common law crime by the State tribunal.

In ex parte Medley, 134 U. S. 160, on original petition for habeas corpus, this court discharged the petitioner convicted of murder in a State court on the ground that the State statute was *ex post facto* and void.

This construction of the statute was directly opposite to the construction put thereon by the State courts.

The decision was followed and another convicted murderer discharged in Savage's case, 134 U. S. 176.

If this court, then, will on habeas corpus construe a State statute in a manner opposed to the interpretation of the State courts, how much more should it overthrow an erroneous decision of the State courts on a question of a common law crime?

The quotation by counsel from the Caldwell case is, we take it, not a happy one; for in his opinion the learned chief justice expressly says that this court may interfere where the Fourteenth Amendment has been violated, and in cases where the form of indictment is obviously violative of a citizen's fundamental rights.

"Other Questions."

Under this head counsel discuss very briefly the following questions:

1. The question of the highway act. It is stated the statute directly "gives the judge discretion as to the place of inprisonment."

We do not concede the proposition for a moment.

Defendants below, as we have shown in our opening brief, could not have been sentenced under either section 1096 or 1097 of the Code, pp. 29 and 30 Trans. (No. 44). The offence with which they were charged was neither a felony nor a statutory misdemeanor, and hence the sentence should have been the punishment prescribed by the common law—jail imprisonment or fine, or both. Such sentence necessarily brings them within the provision of class 1, section 1, of the road act, brief, page 20, Trans. (No. 44), page 30, which leaves the court absolutely without discretion.

It will be observed that a somewhat ingenious plan was devised to uphold the penitentiary sentence.

The indictment in each count charges the conspiracy to have been "felonious." At page 11 of defendants' brief in No. 45, will be found the statute defining felonies and misdemeanors; the former being crimes punishable by death or the penitentiary, the latter all other crimes. By no possible construction can the offense here sought to be charged be deemed a felony, *yet these men are in the penitentiary!*

2. Counsel state that we object for misjoinder of counts. We never have made such objection.

3. Counsel refer to our complaint of the increase of punishment because "of the previous history of defendants," which the "judge heard," and cite in support of the sentence the Wilson case in 121 N. C. 654.

If it be the law, as we concede it to be, that the judge in that State may enhance the punishment because of the previous bad record of the defendant, we insist that such record

must be judicially ascertained in accordance with the statute. The statute is as follows:

INDICTMENT FOR SECOND OFFENSE, HOW FIRST CONVICTION TO BE STATED.—Sec 1187, Code 1883.

In any indictment for an offense which on the second conviction thereof is punished with other or greater punishment than on the first conviction, it shall be sufficient to state that the offender was, at a certain time and place, convicted thereof without otherwise describing the previous offense, and a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.

It will not be contended by counsel for appellee that the statute was followed in the case at bar. The record does not show it, and, *in fact*, no such attempt was made; nor was any allegation touching the matter made in the indictment.

We have treated the matter in our opening brief, page 22.

We have, as we believe, covered the several points in the briefs of opposing counsel. There remains only this broad proposition:

If the courts of North Carolina have discriminated against appellants, if the indictment and conviction are not due process of law, if their fundamental rights as American citizens have been invaded, they look to this court for relief.

If an American citizen can be tried, convicted, and sentenced upon an indictment which is, legally speaking, a blank sheet of paper; if upon such conviction he may be sentenced to a punishment grotesquely enormous; if such sentence is in the face of State statutes, so plain that no layman could misread them; if he may lawfully be denied the presumption of innocence; if in his case the commonest and plainest rules of evidence may contemptuously be disregarded; if the court may single out the complaining witness, confessedly a conspirator for lucre and gain, as a special subject for commendation to the jury; if the State

court may disregard the plain mandatory statute requiring a road sentence for a common law misdemeanor; if the court may listen to gossip *dehors* the record to increase the punishment; if in a conspiracy the court may award varying punishments to the equally guilty conspirators; if the court may award against citizens of other States a sentence for a bare unexecuted conspiracy to defraud five times heavier than an executed conspiracy to debauch and prostitute a seventeen-year old girl; if a State court may impose a penalty twenty times heavier for such unexecuted conspiracy than the minimum for the willful castration of a male human being; if the State court may sentence to a heavier penalty such a bare unexecuted conspiracy than the conspirators in a case to charge and indict a woman with infanticide, and under such circumstances the Federal questions being duly raised United States courts can give no relief, then, indeed, is the Fourteenth Amendment a failure.

The Federal Question.

Opposing counsel rely entirely on the strictly technical proposition that no Federal question is presented in these cases. They do not touch upon the merits.

In addition to the cases elsewhere cited by us, we beg the attention of the court to the following:

In Green Bay *vs.* Patten Paper Co., 172 U. S. 58, 67, it is said that "no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted."

In Dewey *vs.* Des Moines, 173 U. S. 193, 199, the point is again ruled; and the court adds that it is only necessary "which at least would call its (the State court) attention to the Federal question as one that was relied on. . . ."

All of which is respectfully submitted.

FRANK P. BLAIR,
LESTER A. GILMORE,
Attorneys for Appellants and Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

J. L. HOWARD, *alias* FRANK THOMPSON; A. L. DALY, *alias* GONEZ BONO, and H. D. HAWLEY, APPELLANTS,

versus

CAPTAIN J. M. FLEMING, WARDEN OF THE STATE'S PRISON OF NORTH CAROLINA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

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APPELLANTS' ASSIGNMENT OF ERROR.

The appellants' assignment of error (Record, pages 51 and 53) are, briefly, as follows:

1. That the grand jury which presented the bill of indictment against them was illegally drawn.

2. That they were denied the equal protection of the laws of North Carolina by being tried on that bill of indictment.

3. That the trial court did not instruct the jury that the law presumed the petitioners to be innocent until overcome by positive evidence of guilt.

4. That the judgment was illegal, because

(a) It was more severe than usual.

(b) It was unauthorized by statute.

(c) It was cruel and unusual, as defined by the Constitution of North Carolina.'

(d) It violated the Eighth Amendment to the Federal Constitution.

5. For that a conspiracy to cheat and defraud is not a criminal offense in North Carolina.

6 and 7. These are merely formal.

CAN THIS PROCEEDING BE MAINTAINED?

It is a general rule that after a conviction in a State Court, as in the case here, the validity of the proceeding will not be enquired into in habeas corpus proceedings, except in cases of peculiar urgency. That the proper and usual remedy is by writ of error.

In the case of *Whitten v. Tomlinson*, 160 U. S., 238, Mr. Justice Gray points out that there are three methods by which the jurisdiction of the State Courts may be controlled in so far as is necessary to secure the supremacy of the Constitution, laws and treaties of the United States—by writs of error, by removal and writs of *habeas corpus*. It is declared that the Courts of the United States possess the power to enquire if prisoners are held under the authority of a statute in violation of the Constitution, laws or treaties of the United States under

writs of *habeas corpus*, but that they are not obliged to do so and will not do so except in peculiar and urgent cases—that is, cases which affect the Federal Government, the administration of its laws and the like. That in other cases the petitioner will be left to his remedy by writ of error. He declared: "But, except in such peculiar and urgent cases, the Courts of the United States will not discharge the prisoner by *habeas corpus* in advance of a final determination of his case in the Courts of the State; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this Court. *Ex parte Royall*, 117 U. S., 241; *Ex parte Fonda*, 117 U. S., 516; *Duncan v. McCall*, 139 U. S., 449; *Wood v. Brush*, 140 U. S., 278; *Jugiro v. Brush*, 140 U. S., 291; *Cook v. Hart*, 146 U. S., 183; *Ex parte Frederich*, 149 U. S., 70; *New York v. Eno*, 155 U. S., 89; *Pepke v. Cronan*, 155 U. S., 100; *Bergemamm v. Backer*, 157 U. S., 655."

In the case of *In re Grice*, 79 Fed. Rep., 635, Judge Swayne, after citing a number of authorities, declared that the cases of urgency mentioned in *Whitten v. Tomlinson* did not include all of the urgency cases, and proceeded to pass upon the constitutionality of the Texas "Anti-trust Act," and discharged the prisoner upon the ground that this act was unconstitutional.

But in *Baker v. Grice*, 169 U. S., 284, the Supreme Court of the United States reversed Judge Swayne and declared that the question ought not to have been decided by him upon a writ of *habeas corpus*. After restating the rule, Mr. Justice Peckham, for the Court, said: "The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal Courts by which a person under an indictment in a State Court and subject to its laws may, by the decision of a single Judge of the Federal Court upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the State Courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *In re Loney*, 134 U. S., 372, and *In re Neagle*, 135 U. S., 1, but the reasons

for the interference of the Federal Courts in each of these cases were extraordinary and presented what this Court regarded as such exceptional facts as to justify the interference of the Federal tribunal."

In the case of *Boske v. Commingore,* 177 U. S., 460, is found a recent instance of a case of urgency, in that the petitioner was an officer in the revenue service of the United States, whose presence at his post of duty was important to the public interests.

It may be suggested that Grice's case was a petition for *habeas corpus* before conviction. The case of *Markuson v. Boucher,* 175 U. S., 184, is one of the last and most conclusive utterances of the Court. In that case, after conviction, petitioner was sentenced to one year in a penitentiary under an alleged unconstitutional statute. It was urged for petitioner that he was in "straitened circumstances and without means or power to prosecute a writ of error from the Supreme Court of the State to the Supreme Court of the United States or to employ counsel to present or argue it there, and is informed and believes if he had such means it could not be brought on for hearing before the expiration of his sentence."

The Court, speaking through Mr. Justice McKenna in that case, said, after quoting from *Baker v. Grice, supra:* "The jurisiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a State in which the constitutional rights of a prisoner could have been claimed and may be were rightly decided, or, if not rightly decided, could be reviewed and redressed by a writ of error from this Court.

"The case at bar presents no circumstances to justify a departure from the rule or to relieve from the application of its reasons."

This doctrine has been again stated by Mr. Justice Brown in the case of *Davis v. Burke,* 179 U. S., 399. See also *Minnesota v. Brundage,* 180 U. S., 499.

The last decision to which we have access is *Reid v. Jones,* ... U. S., ..., where Mr. Justice Harlan declared for the Court: "The merits of this case have been fully considered in

case No. 269 (*Reid v. Colorado*, 187 U. S., ..., *post*, 92, 23 Sup. Ct. Rep., 92). But if this had not been, we should dismiss the present appeal; for one convicted in a State Court for an alleged violation of the criminal statutes of the State, and who contends that he is held in violation of the Constitution of the United States, must ordinarily first take his case to the highest court of the State in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this Court by writ of error; that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this Court upon appeal from a Circuit Court, intervene by writ of *habeas corpus* in advance of the final action by the highest court of the State. *Ex parte Royall*, 117 U. S., 241, 251; *New York v. Eno*, 155 U. S., 89; *Minnesota v. Brundage*, 180 U. S., 499, 502, and authorities cited."

FIRST ASSIGNMENT OF ERROR.

The appellants contend that they should have been discharged on the writ of *habeas corpus* because of informalities in the manner in which the jury was drawn for the court at which the bill of indictment was found and they tried and convicted. It will be observed that while a motion was made to quash the bill of indictment (Record, page 62), this objection was not made, and was first heard of in the replication of the petitioners to the answer of the Warden of the State Penitentiary to the writ of *habeas corpus* (Record, page 24), where the facts are stated constituting the alleged illegal method of drawing the grand jury.

These alleged irregularities cannot avail the appellants, for two reasons:

THE OBJECTION SHOULD HAVE BEEN TAKEN BEFORE PLEA TO THE INDICTMENT.

"The settled rule of a State Court that objections to the manner of selecting grand jurors on behalf of one who has been indicted by such jurors must be taken by plea in abatement, and not by motion to quash the venire and panel, is binding on

the Supreme Court of the United States on writ of error to the State Court." Torrence v. Florida, U. S. (October Term, 1902).

It is the settled rule in North Carolina that exceptions to the constitution and qualification of the grand jury must be taken before plea, or they will be declared to have been waived.

The rule is thus stated in *State v. Gardner,* 104 N. C., 739: "If the motion is made before plea, the defendant has the right in law to have the qualification or constitution of the grand jury inquired into and passed upon; but if made after plea and before the jury is empaneled, it may be granted or not, in the sound discretion of the presiding judge, but if it is not made until after the jury is sworn, the objection will be deemed to have been waived."

This case has since been approved in the following cases:

State v. Wilcox, 104 N. C., 853.
State v. Sharp, 110 N. C., 604.
State v. Fertilizer Company, 111 N. C., 658.
State v. DeGraff, 113 N. C., 688.

Avery, J., thus states the rule in Sharp's case: "The general rule is that such a plea will not be sustained, if admitted to be true, unless it show a want of some positive qualification prescribed by law; that all other objections to the competency of a grand juror must be taken, if at all, by challenge, and will not be heard after the time for challenging is passed. Thom. & Mer. on Juries, section 533; Bishop Cr. Prac., section 739; *People v. Jarrett,* 3 Wend., 314; 12 Am. & Eng. Enc., 343*a*."

The last time the question was presented to the North Carolina Supreme Court was in *State v. Parker,* 43 Southeastern Reporter, 830 (not yet officially reported), in which the Court declares:

"A special venire of twenty-five freeholders was summoned under the order of the Court, whose names were drawn from the jury box, in the presence and under the direction of the Court, by a boy who was over ten years of age, and five of the jurors so drawn were taken and served upon the jury. There does not appear to have been any challenge or objection to any

of them. So far as it does appear, they were each and all perfectly acceptable to the State and defendant. After the verdict of guilty had been returned by the jury, the defendant, through his counsel, moved in arrest of judgment upon the ground that the special venire had been drawn by a boy over ten years of age, and that five of the venire had served as jurors in the case. The motion of the defendant to arrest the judgment was properly overruled. It was too late after the verdict to present any objection to the manner of selecting the jurors for the special venire by a motion in arrest of judgment."

But the matter is settled by statute, for the Legislature in 1883 put into statutory form what had previously been the acknowledged practice in this State. The following is section 1741 of The Code:

"All exceptions to grand jurors for and on account of their disqualification shall be taken before the jury is sworn and empaneled to try the issue by motion to quash the bill of indictment, and if not so taken, the same shall be deemed to have been waived."

THE FEDERAL COURTS ADMINISTER THE SAME RULE.

The petitioners will hardly seriously contend that this statute is in contravention of the Federal Constitution, for the Federal practice is uniform with the State procedure and the State statute, for it was held, in *United States v. Gale*, 109 U. S., 65 (27: 857), that a plea to an indictment is a waiver of the mode of selecting a grand jury, even though the objection is upon the ground that the act under which the grand jury was drawn and selected is unconstitutional, *i. e.*, that it violates the provisions of the Federal Constitution.

Again, in *Agnew v. United States*, 165 U. S., 36 (41: 624), it was held that "a plea in abatement of an indictment stating that the drawing of the grand jurors tended to the defendant's injury and prejudice, without stating any grounds for such conclusion, is fatally defective"; and that "an objection to irregularities in drawing grand jurors is too late when it is made in a plea of abatement filed five days after indictment and

two weeks after the irregularities complained of began, when no reason is given for failure to make the objection sooner."

Again, in *Andrews v. Swartz,* 156 U. S., 272, petitioner alleged that he was deprived of his constitutional protection, in that in making up the grand jury which indicted him and the petit jury which tried him the sheriff had purposely excluded therefrom negroes—petitioner being a negro—and he offered to show this to the Court, which refused to hear it. The Court held that this does not entitle him to *habeas corpus;* that if it were so, the State Court had not thereby lost jurisdiction of the offense or of the accused.

THE STATUTE IS MERELY DIRECTORY.

But even if the appellants had in apt time objected to the alleged irregularities in the method of drawing the grand jury, it would not have availed them, for the Supreme Court of North Carolina holds that the provisions regulating the drawing of grand juries are not mandatory, but are merely directory.

"It has always been held that the regulation of The Code, sections 1722 and 1728, are directory only to the Board of County Commissioners, and, while they should be observed, a failure to do so does not vitiate the venire in the absence of bad faith or corruption on the part of the County Commissioners." Quotation from *State v. Perry* (Hatton), 122 N. C. R., 1020.

The opinion quotes as authority for this statement the following cases:

State v. Smarr, 121 N. C. R., 669.
State v. Stanton, 118 N. C. R., 1182.
State v. Fertilizer Company, 111 N. C., 658.
State v. Wilcox, 104 N. C., 847.
State v. Hensley, 94 N. C., 1021.
State v. Martin, 82 N. C., 672.
State v. Griffice, 74 N. C., 316.
State v. Haywood, 73 N. C., 437.

See also *State v. Potts,* 100 N. C., 460, where it appeared

that there was but one key, and boxes were improperly labelled. Chief Justice Smith said: "The ruling is correct, and the deviation from a direction merely of the act is not a material matter, as its esssential provisions for the security of the accused have been observed."

State v. Martin, 82 N. C., 672, is strikingly in point with the case at bar. There, upon a motion to quash in apt time, it appeared that the County Commissioners, after drawing certain jurors, put their names back into the box and drew others so as to secure an equality of jurors from the different townships in the county. It was held that while not in strict compliance with The Code, the act being merely directory and not mandatory, and no actual wrong had been done or intended, the challenge to the array was overruled.

In our case the names from each township were put into smaller boxes inside of the boxes prescribed by law, and certain numbers were drawn from each of the smaller boxes to secure equality among the several townships, and it does not appear that any wrong was done or intended to the petitioners. The case is clearly within the rule stated in Martin's case.

SECOND ASSIGNMENT OF ERROR.

The second assignment of error (Record, page 53) is that the Supreme Court of North Carolina did not find as a fact and hold as its judgment that the appellants were denied the equal protection of the laws of the State of North Carolina in accepting and filing the bill of indictment on which they were tried.

It is presumed that this is a mere repetition of the first assignment of error, which has already been answered. This assignment specially objects to the finding of facts by the State Courts. These cannot be reviewed either upon appeal or writ of error.

Dower v. Richards, 151 U. S., 663, 668, 669.
In re Buchanan, 158 U. S., 31.
Bartlett v. Lockwood, 160 U. S., 360.
Stanley v. Schwalby, 162 U. S., 278.
Noble v. Mitchell, 164 U. S., 373.
Israel v. Arthur, 152 U. S., 362.

It is for the State Court to determine whether or not its statutes are binding under the State Constitution, and whether one has received equal protection of the laws of the State in a regular administration of the criminal law. *Leeper v. Texas*, 139 U. S., 462; *O'Neil v. Vermont*, 144 U. S., 336.

INSUFFICIENCY OF INDICTMENT NOT A FEDERAL QUESTION.

An erroneous ruling on a defective indictment does not present a Federal question.

Bergemann v. Backer, 157 U. S., 655.
Central Land Company v. Laidley, 159 U. S., 112.
Gibson v. Mississippi, 162 U. S., 59.
In re Boardmen, 169 U. S., 44.
Remington Paper Company v. Watson, 173 U. S., 451.
Kohl v. Lehlback, 160 U. S., 293.

Due process of law does not even require an indictment where information is provided for.

McNulty v. California, 149 U. S., 645.
Talton v. Mayes, 163 U. S., 384.
Nordstron v. Washington, 164 U. S., 705.

The question as to whether or not an indictment charges a crime under the laws of a State does not present a Federal question.

Caldwell v. Texas, 137 U. S., 692.
Davis v. Texas, 139 U. S., 652.
Bergemann v. Backer, 157 U. S., 656.
O'Neil v. Vermont, 144 U. S., 323.

THIRD ASSIGNMENT OF ERROR.

The third assignment of error (Record, page 53) is that the appellants were denied equal protection of the laws of North Carolina, in that the *nisi prius* judge did not instruct the jury that they were presumed to be innocent, and that this presumption attended them until it was overcome by positive evidence of guilt.

The answer to this assignment of error is that it is untrue in fact. While the judge did not charge the jury in the very language asked, he impressed upon the jury four different times not only that there was a presumption of innocence, but that this presumption should not only be rebutted by the facts proved, but that they should satisfy the jury *beyond reasonable doubt.*

The material part of the judge's charge on this subject is as follows (Record, pages 118 and 119):

"Where the State asks a conviction of any one charged with the commission of crime, it must satisfy the jury from the evidence in the case of the guilt of the accused *beyond a reasonable doubt*, and if it fails to do so, the jury should acquit, but if the evidence so satisfies, then the jury should convict. This rule of law applies to the case at bar, and if upon consideration of the evidence offered by the State, it satisfies you of the guilt of the defendants, or any two of them, *beyond a reasonable doubt,* then your verdict should be 'guilty' as to such, naming them; otherwise, if you are not so satisfied, that is to say, your verdict should be 'not guilty.'

"Now, what is a reasonable doubt? While there is no set formula that is used defining it, it may be defined for the purpose of this charge as being such a doubt as would appeal to and be supported by the reasoning of a man of ordinary intelligence, or, as has perhaps been more aptly expressed by our Supreme Court, as meaning that after a consideration of all the evidence with all the light derived from the argument of counsel and the instructions of the Court, the jury ought not to convict unless they find that their minds have been involuntarily led to the conviction that the prisoner was 'guilty,' as charged.

"Now, upon the consideration of the evidence, the argument of counsel and the charge of the Court in this case, say whether or not you are satisfied *beyond reasonable doubt* of the guilt of the defendants or any two of them, and if so, your verdict as to such should be guilty, naming them; otherwise, if not so satisfied, that is, 'not guilty' as to any or all of the defendants, as you may find. * * *

* * * "Take all the facts and circumstances disclosed by the evidence, and if they satisfy you *beyond a reasonable doubt*

of the existence of the conspiracy charged against the defendants or any two of them, then the act of any one of them is the act of all and each of the conspirators."

But even if this were error, no Federal question is presented by it.

FOURTH ASSIGNMENT OF ERROR.

This assignment of error alleges that the judgment and sentence imposed upon the defendants is void for four reasons:

(a) The first reason assigned is that in fact the sentence is more severe than that which has ever before been imposed.

There is no fact found in the record to support this contention, and a Federal question cannot be thus presented. *Walker v. Vellaraso*, 6 Wall., 128; *Dower v. Richards*, 151 U. S., 663.

(b) It is next contended that the sentence was unauthorized by the statutes of North Carolina. By the Public Laws of 1891, chapter 205, it was enacted as follows:

"A felony is a crime which is or may be punishable by either death or imprisonment in the State's Prison. Any other crime is a misdemeanor."

By section 1097 of The Code of North Carolina (1883) it is enacted that—

"Offenses made misdemeanors by statute, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offense be infamous or done in secrecy and malice or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or penitentiary not less than four months nor more than ten years, and be fined."

The Supreme Court of North Carolina, in the case of *State v. Mallett*, 125 N. C., 718, which was an indictment for a conspiracy to cheat and defraud, decided that under these two statutes one convicted of a conspiracy to defraud could be punished by imprisonment in the State Prison or Penitentiary for a period not exceeding ten years. Mallett's case was taken by writ of error to the Supreme Court of the United States. But this point was not even presented there.

The Supreme Court of North Carolina, in its opinion in the case at bar, says: "The defendants except to the sentence imposed of imprisonment in the penitentiary, but concede that this Court has ruled otherwise in *State v. Mallett,* 125 N. C., 718, which we reaffirm."

This is simply a case of a State Court determining the meaning of a State statute and Constitution, and contains nothing that is obviously violative of the fundamental principles.

Leeper v. Texas, 139 U. S., 462.
O'Neil v. Vermont, 144 U. S., 336.
McNulty v. California, 149 U. S., 645.
Lambert v. Barrett, 157 U. S., 697.
Raezel v. Kirk, 172 U. S., 646.
Bergemann v. Backer, 157 U. S., 655.
Kohl v. Lehlback, 160 U. S., 296.

(c) It is further contended that the judgment is void because the punishment is cruel and unusual as defined by the Constitution of North Carolina.

It was expressly held in *O'Neil v. Vermont,* 144 U. S., 323, that the question as to whether or not the punishment of a criminal is cruel or unusual under the Constitution and laws of a State is not a Federal one.

(d) It is further contended that the punishment is violative of the Eighth Amendment of the Federal Constitution.

The Eighth Amendment is inapplicable to the States, and applies only to Federal action.

O'Neil v. Vermont, 144 U. S., 323.
Barron v. Baltimore, 7 Pet., 243.
Pervear v. Massachusetts, 5 Wall., 475.
Ex parte Kemmler, 136 U. S., 436.
Davis v. Texas, 139 U. S., 651.

FIFTH ASSIGNMENT OF ERROR.

The fifth assignment of error is that a conspiracy to cheat and defraud is not a criminal offense in North Carolina.

Decision of State Court as to Existence of Law Conclusive.

The petitioners contend that there is no statute or provision of the common law which makes their conduct indictable in North Carolina, and that there being no criminal offense, they are held without due process of law.

It is not contended that if such a law exists it contravenes any provision of the Federal Constitution. The Legislature clearly has the right to pass such a law. The only question is, does such a law exist?

In the case of *Duncan v. McCall*, 139 U. S., 449, the petitioner contended that there was no act in the State of Texas making the offense of which he was charged indictable, and that for that reason "he was deprived of his liberty without due process of law and denied the equal protection of the laws." He contended that the statute was void because it had not been enacted in accordance with the requirements of the Constitution of Texas.

The following is the head-note of the decision:

"2. The decision of the State Courts on the question as to what are the laws of a State is binding upon those of the United States."

"3. Whether certain statutes of a State have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States and raises no Federal question giving the Courts of the United States jurisdiction."

In the case of *Leeper v. Texas*, 139 U. S., 462, Mr. Chief Justice Fuller, in speaking for the Court, said:

"It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken. * * *

"That whether statutes of a Legislature of a State have been

duly enacted in accordance with the requirements of the Constitution of such State is not a Federal question, and the decision of State Courts as to what are the laws of the State is binding upon the Courts of the United States. *South Ottawa v. Perkins*, 94 U. S., 260, 268 (24: 154, 157); *Post v. Kendall County Sup'rs*, 105 U. S., 667 (26: 1204); *Norton v. Shelby County*, 118 U. S., 425, 440 (30: 178, 185); *Atlantic & G. R. Co. v. Georgia*, 98 U. S., 359, 366 (25: 185, 188); *Baldwin v. Kansas*, 129 U. S., 52, 57 (32: 640, 642). That by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons or classes of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied."

The Supreme Court of North Carolina, in *State v. Brady*, 107 N. C., 822, decided that an indictment of the same character as that upon which petitioners were tried and convicted was good, and charged an offense against the criminal laws of North Carolina, citing other North Carolina authorities to sustain the position of the Court. Brady's case has been subsequently cited with approval nine times. As early as December Term, 1827, the Supreme Court of North Carolina had declared conspiracy to cheat and defraud to be a crime in this State. *State v. Younger*, 12 N. C. R., 357.

In the case of *Caldwell v. Texas*, 137 U. S., 691, the writ of error had been granted to the Court of Appeals of Texas upon the ground "that the indictment is fatally and fundamentally defective and void under the Constitution of the State and does not, either in form or substance, set out a valid charge of murder or any other offense known to the criminal law of the State, and is not due process of law under the Fourteenth Amendment of the Constitution of the United States." The writ of error was dismissed, on motion. Mr. Chief Justice Fuller, delivering the opinion, said:

"By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no

State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requirement is satisfied. 2 Kent. Com., 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank v. Oakley*, 17 U. S., 244. The powers of the State must be exercised within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. *Hurtado v. California*, 110 U. S., 516. No question of repugnancy to the Federal Constitution can be fairly said to arise when the enquiry of the State Courts is directed to the sufficiency of an indictment in the ordinary administration of the criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to." * * *

See also authorities cited under second assignment of error.

OTHER QUESTIONS.

The appellants present several other objections, either in their petition for a writ of *habeas corpus* and writ of error, or in their brief.

One relates to the question of whether they should be imprisoned in the penitentiary, or sentenced to work on the highways of Guilford county. This question was first presented in the rejoinder to the answer to the writ of *habeas corpus*.

The statute in direct terms gives the Judge discretion as to the place of imprisonment.

In the case of *Davis v. Burke*, 179 U. S., 404, it was decided that the place of execution did not present a Federal question.

The validity of a sentence under a State law will not be reviewed by the Supreme Court. *Storti v. Massachusetts*, 183 U. S., 142.

The appellants object that there was a misjoiner in the original bill of indictment which contained three counts. At the

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close of the evidence, two of them were *nol prossed* and used as bills of particulars upon the first count.

It was held that a Federal question was not presented by the suggestion of a misjoinder of counts in the indictment in the case of *McDonald v. Massachusetts*, 180 U. S., 313.

The instruction that the jury might find the defendant guilty if satisfied that he had killed and murdered, "in the manner and form charged in either of the counts," though one was bad, does not violate the Constitution of the United States so as to give jurisdiction to the Supreme Court. *Brooks v. Missouri*, 124 U. S., 396.

The appellants further contend that the Judge in imposing the sentence increased the term to imprisonment because of facts pertaining to the previous history of the defendants which he himself heard.

It was held in *State v. Wilson*, 121 N. C., 654, that in a charge for conspiracy to seduce a woman the previous character of the defendant ought justly and properly to be considered in passing sentence.

It was held in *Moore v. Missouri*, 159 U. S., 673, that an increased severity of punishment for the second offense is not a second punishment for the first offense.

In *State v. Hamby*, 126 N. C., 1066, the case of *State v. Wilson, supra*, is affirmed, and the right of the Judge to take into consideration the past record of defendant is sustained. See also *State v. Davidson*, 124 N. C., 844.

CONCLUSION.

We conclude this brief by making the following quotation from the opinion of the Court, written by Mr. Chief Justice Fuller, in the case of *Lambert v. Barrett*, 157 U. S. 697:

"With the disposition of State questions by the appropriate State authorities, it is not the province of this Court to interfere, and there is no basis for the suggestion of any violation of the Constitution of the United States; the denial of due process of law; or deprivation of any right, privilege, or immu-

nity secured to him by the Constitution or laws of the United States."

Hallinger v. Davis, 146 U. S., 314, (36: 986).
Ex parte Kemmler, 136 U. S., 346, (34: 519).
Caldwell v. Texas, 137 U. S., 692, (34: 816).
Ex parte Converse, 137 U. S., 624, (34: 796).
McNulty v. California, 149 U. S., 645, (37: 882).

The fifth assignment of error will be made the subject of a supplemental brief.

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DEFENDANT'S

BRIEF

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

J. L. HOWARD, *alias* FRANK THOMPSON; A. L. DALY, *alias* GONEZ BONO, and H. D. HAWLEY, PLAINTIFFS IN ERROR,

versus

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Brief for D. C.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

On March 23, 1901, the defendants were arrested upon a warrant issued by a justice of the peace of Guilford county, North Carolina, charging them with conspiracy to defraud. Record, page 21.

The justice, having found that there was probable cause of guilt, held the defendants to bail for their appearance at the next term of the Superior Court of Guilford county, which court is one of general criminal jurisdiction.

At June Term, 1901, of said court an indictment was duly returned "a true bill" by the grand jury of said county. Record, page 59. The indictment as found contained three counts.

The defendants endeavored to quash the bill of indictment, assigning nine reasons therefor. Record, pages 62, 63, 64.

Upon the refusal of their motion, the defendants entered a plea of not guilty. There was a trial by a jury, a verdict of guilty and judgment sentencing the defendants Howard and Hawley to ten years and Daly to seven years in the State Penitentiary.

On appeal to the Supreme Court, the judgment was affirmed. Record, page 23. The defendants were then duly confined in the State Penitentiary of North Carolina.

Whereupon the defendants applied for and obtained a writ of error to the Supreme Court of the United States, and are the plaintiffs in error here.

APPELLANTS' ASSIGNMENT OF ERROR.

The appellants' assignment of error (Record, pages 51 and 53) are, briefly, as follows:

1. That the grand jury which presented the bill of indictment against them was illegally drawn.

2. That they were denied the equal protection of the laws of North Carolina by being tried on that bill of indictment.

3. That the trial court did not instruct the jury that the law presumed the petitioners to be innocent until overcome by positive evidence of guilt.

4. That the judgment was illegal, because

(a) It was more severe than usual.

(b) It was unauthorized by statute.

(c) It was cruel and unusual, as defined by the Constitution of North Carolina.

(d) It violated the Eighth Amendment to the Federal Constitution.

5. For that a conspiracy to cheat and defraud is not a criminal offense in North Carolina.

6 and 7. These are merely formal.

FIRST ASSIGNMENT OF ERROR.

The plaintiffs in error contend that the judgment of the Supreme Court of the State of North Carolina should be reversed because of informalities in the manner in which the jury was drawn for the court at which the bill of indictment was found and they tried and convicted. It will be observed that while a motion was made to quash the bill of indictment (Record, page 62), this objection was not made, and was first heard of in the replication of the petitioners to the answer of the Warden of the State Penitentiary to the writ of *habeas corpus* (Record, page 24), while the facts are stated constituting the alleged illegal method of drawing the grand jury.

These alleged irregularities cannot avail the appellants, for two reasons:

THE OBJECTION SHOULD HAVE BEEN TAKEN BEFORE PLEA TO THE INDICTMENT.

"The settled rule of a State Court that objections to the manner of selecting grand jurors on behalf of one who has been indicted by such jurors must be taken by plea in abatement, and not by motion to quash the venire and panel, is binding on

the Supreme Court of the United States on writ of error to the State Court." Torrence v. Florida, U. S. (October Term, 1902).

It is the settled rule in North Carolina that exceptions to the constitution and qualification of the grand jury must be taken before plea, or they will be declared to have been waived.

The rule is thus stated in *State v. Gardner,* 104 N. C., 739: "If the motion is made before plea, the defendant has the right in law to have the qualification or constitution of the grand jury inquired into and passed upon; but if made after plea and before the jury is empaneled, it may be granted or not, in the sound discretion of the presiding judge, but if it is not made until after the jury is sworn, the objection will be deemed to have been waived."

This case has since been approved in the following cases:

State v. Wilcox, 104 N. C., 853.
State v. Sharp, 110 N. C., 604.
State v. Fertilizer Company, 111 N. C., 658.
State v. DeGraff, 113 N. C., 688.

Avery, J., thus states the rule in Sharp's case: "The general rule is that such a plea will not be sustained, if admitted to be true, unless it show a want of some positive qualification prescribed by law; that all other objections to the competency of a grand juror must be taken, if at all, by challenge, and will not be heard after the time for challenging is passed. Thom. & Mer. on Juries, section 533; Bishop Cr. Prac., section 739; *People v. Jarrett,* 3 Wend., 314; 12 Am. & Eng. Enc., 343*a*."

The last time the question was presented to the North Carolina Supreme Court was in *State v. Parker,* 43 Southeastern Reporter, 830 (not yet officially reported), in which the Court declares:

"A special venire of twenty-five freeholders was summoned under the order of the Court, whose names were drawn from the jury box, in the presence and under the direction of the Court, by a boy who was over ten years of age, and five of the jurors so drawn were taken and served upon the jury. There does not appear to have been any challenge or objection to any

of them. So far as it does appear, they were each and all perfectly acceptable to the State and defendant. After the verdict of guilty had been returned by the jury, the defendant, through his counsel, moved in arrest of judgment upon the ground that the special venire had been drawn by a boy over ten years of age, and that five of the venire had served as jurors in the case. The motion of the defendant to arrest the judgment was properly overruled. It was too late after the verdict to present any objection to the manner of selecting the jurors for the special venire by a motion in arrest of judgment."

But the matter is settled by statute, for the Legislature in 1883 put into statutory form what had previously been the acknowledged practice in this State. The following is section 1741 of The Code:

"All exceptions to grand jurors for and on account of their disqualification shall be taken before the jury is sworn and empaneled to try the issue by motion to quash the bill of indictment, and if not so taken, the same shall be deemed to have been waived."

THE FEDERAL COURTS ADMINISTER THE SAME RULE.

The petitioners will hardly seriously contend that this statute is in contravention of the Federal Constitution, for the Federal practice is uniform with the State procedure and the State statute, for it was held, in *United States v. Gale*, 109 U. S., 65 (27: 857), that a plea to an indictment is a waiver of the mode of selecting a grand jury, even though the objection is upon the ground that the act under which the grand jury was drawn and selected is unconstitutional, *i. e.*, that it violates the provisions of the Federal Constitution.

Again, in *Agnew v. United States*, 165 U. S., 36 (41: 624), it was held that "a plea in abatement of an indictment stating that the drawing of the grand jurors tended to the defendant's injury and prejudice, without stating any grounds for such conclusion, is fatally defective"; and that "an objection to irregularities in drawing grand jurors is too late when it is made in a plea of abatement filed five days after indictment and

two weeks after the irregularities complained of began, when no reason is given for failure to make the objection sooner."

Again, in *Andrews v. Swartz*, 156 U. S., 272, petitioner alleged that he was deprived of his constitutional protection, in that in making up the grand jury which indicted him and the petit jury which tried him the sheriff had purposely excluded therefrom negroes—petitioner being a negro—and he offered to show this to the Court, which refused to hear it. The Court held that this does not entitle him to *habeas corpus;* that if it were so, the State Court had not thereby lost jurisdiction of the offense or of the accused.

THE STATUTE IS MERELY DIRECTORY.

But even if the appellants had in apt time objected to the alleged irregularities in the method of drawing the grand jury, it would not have availed them, for the Supreme Court of North Carolina holds that the provisions regulating the drawing of grand juries are not mandatory, but are merely directory.

"It has always been held that the regulation of The Code, sections 1722 and 1728, are directory only to the Board of County Commissioners, and, while they should be observed, a failure to do so does not vitiate the venire in the absence of bad faith or corruption on the part of the County Commissioners." Quotation from *State v. Perry* (Hatton), 122 N. C. R., 1020.

The opinion quotes as authority for this statement the following cases:

State v. Smarr, 121 N. C. R., 669.
State v. Stanton, 118 N. C. R., 1182.
State v. Fertilizer Company, 111 N. C., 658.
State v. Wilcox, 104 N. C., 847.
State v. Hensley, 94 N. C., 1021.
State v. Martin, 82 N. C., 672.
State v. Griffice, 74 N. C., 316.
State v. Haywood, 73 N. C., 437.

See also *State v. Potts*, 100 N. C., 460, where it appeared

that there was but one key, and boxes were improperly labelled. Chief Justice Smith said: "The ruling is correct, and the deviation from a direction merely of the act is not a material matter, as its esssential provisions for the security of the accused have been observed."

State v. Martin, 82 N. C., 672, is strikingly in point with the case at bar. There, upon a motion to quash in apt time, it appeared that the County Commissioners, after drawing certain jurors, put their names back into the box and drew others so as to secure an equality of jurors from the different townships in the county. It was held that while not in strict compliance with The Code, the act being merely directory and not mandatory, and no actual wrong had been done or intended, the challenge to the array was overruled.

In our case the names from each township were put into smaller boxes inside of the boxes prescribed by law, and certain numbers were drawn from each of the smaller boxes to secure equality among the several townships, and it does not appear that any wrong was done or intended to the petitioners. The case is clearly within the rule stated in Martin's case.

SECOND ASSIGNMENT OF ERROR.

The second assignment of error (Record, page 53) is that the Supreme Court of North Carolina did not find as a fact and hold as its judgment that the appellants were denied the equal protection of the laws of the State of North Carolina in accepting and filing the bill of indictment on which they were tried.

It is presumed that this is a mere repetition of the first assignment of error, which has already been answered. This assignment specially objects to the finding of facts by the State Courts. These cannot be reviewed either upon appeal or writ of error.

Dower v. Richards, 151 U. S., 663, 668, 669.
In re Buchanan, 158 U. S., 31.
Bartlett v. Lockwood, 160 U. S., 360.
Stanley v. Schwalby, 162 U. S., 278.
Noble v. Mitchell, 164 U. S., 373.
Israel v. Arthur, 152 U. S., 362.

It is for the State Court to determine whether or not its statutes are binding under the State Constitution, and whether one has received equal protection of the laws of the State in a regular administration of the criminal law. *Leeper v. Texas,* 139 U. S., 462; *O'Neil v. Vermont,* 144 U. S., 336.

INSUFFICIENCY OF INDICTMENT NOT A FEDERAL QUESTION.

An erroneous ruling on a defective indictment does not present a Federal question.

Bergemann v. Backer, 157 U. S., 655.
Central Land Company v. Laidley, 159 U. S., 112.
Gibson v. Mississippi, 162 U. S., 59.
In re Boardmen, 169 U. S., 44.
Remington Paper Company v. Watson, 173 U. S., 451.
Kohl v. Lehlback, 160 U. S., 293.

Due process of law does not even require an indictment where information is provided for.

McNulty v. California, 149 U. S., 645.
Talton v. Mayes, 163 U. S., 384.
Nordstron v. Washington, 164 U. S., 705.

The question as to whether or not an indictment charges a crime under the laws of a State does not present a Federal question.

Caldwell v. Texas, 137 U. S., 692.
Davis v. Texas, 139 U. S., 652.
Bergemann v. Backer, 157 U. S., 656.
O'Neil v. Vermont, 144 U. S., 323.

THIRD ASSIGNMENT OF ERROR.

The third assignment of error (Record, page 53) is that the appellants were denied equal protection of the laws of North Carolina, in that the *nisi prius* judge did not instruct the jury that they were presumed to be innocent, and that this presumption attended them until it was overcome by positive evidence of guilt.

The answer to this assignment of error is that it is untrue in fact. While the judge did not charge the jury in the very language asked, he impressed upon the jury four different times not only that there was a presumption of innocence, but that this presumption should not only be rebutted by the facts proved, but that they should satisfy the jury *beyond reasonable doubt.*

The material part of the judge's charge on this subject is as follows (Record, pages 118 and 119):

"Where the State asks a conviction of any one charged with the commission of crime, it must satisfy the jury from the evidence in the case of the guilt of the accused *beyond a reasonable doubt*, and if it fails to do so, the jury should acquit, but if the evidence so satisfies, then the jury should convict. This rule of law applies to the case at bar, and if upon consideration of the evidence offered by the State, it satisfies you of the guilt of the defendants, or any two of them, *beyond a reasonable doubt,* then your verdict should be 'guilty' as to such, naming them; otherwise, if you are not so satisfied, that is to say, your verdict should be 'not guilty.'

"Now, what is a reasonable doubt? While there is no set formula that is used defining it, it may be defined for the purpose of this charge as being such a doubt as would appeal to and be supported by the reasoning of a man of ordinary intelligence, or, as has perhaps been more aptly expressed by our Supreme Court, as meaning that after a consideration of all the evidence with all the light derived from the argument of counsel and the instructions of the Court, the jury ought not to convict unless they find that their minds have been involuntarily led to the conviction that the prisoner was 'guilty,' as charged.

"Now, upon the consideration of the evidence, the argument of counsel and the charge of the Court in this case, say whether or not you are satisfied *beyond reasonable doubt* of the guilt of the defendants or any two of them, and if so, your verdict as to such should be guilty, naming them; otherwise, if not so satisfied, that is, 'not guilty' as to any or all of the defendants, as you may find. * * *

* * * "Take all the facts and circumstances disclosed by the evidence, and if they satisfy you *beyond a reasonable doubt*

of the existence of the conspiracy charged against the defendants or any two of them, then the act of any one of them is the act of all and each of the conspirators."

But even if this were error, no Federal question is presented by it.

FOURTH ASSIGNMENT OF ERROR.

This assignment of error alleges that the judgment and sentence imposed upon the defendants is void for four reasons:

(a) The first reason assigned is that in fact the sentence is more severe than that which has ever before been imposed.

There is no fact found in the record to support this contention, and a Federal question cannot be thus presented. *Walker v. Vellaraso*, 6 Wall., 128; *Dower v. Richards*, 151 U. S., 663.

(b) It is next contended that the sentence was unauthorized by the statutes of North Carolina. By the Public Laws of 1891, chapter 205, it was enacted as follows:

"A felony is a crime which is or may be punishable by either death or imprisonment in the State's Prison. Any other crime is a misdemeanor."

By section 1097 of The Code of North Carolina (1883) it is enacted that—

"Offenses made misdemeanors by statute, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offense be infamous or done in secrecy and malice or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or penitentiary not less than four months nor more than ten years, and be fined."

The Supreme Court of North Carolina, in the case of *State v. Mallett*, 125 N. C., 718, which was an indictment for a conspiracy to cheat and defraud, decided that under these two statutes one convicted of a conspiracy to defraud could be punished by imprisonment in the State Prison or Penitentiary for a period not exceeding ten years. Mallett's case was taken by writ of error to the Supreme Court of the United States. But this point was not even presented there.

The Supreme Court of North Carolina, in its opinion in the case at bar, says: "The defendants except to the sentence imposed of imprisonment in the penitentiary, but concede that this Court has ruled otherwise in *State v. Mallett,* 125 N. C., 718, which we reaffirm."

This is simply a case of a State Court determining the meaning of a State statute and Constitution, and contains nothing that is obviously violative of the fundamental principles.

Leeper v. Texas, 139 U. S., 462.
O'Neil v. Vermont, 144 U. S., 336.
McNulty v. California, 149 U. S., 645.
Lambert v. Barrett, 157 U. S., 697.
Raezel v. Kirk, 172 U. S., 646.
Bergemann v. Backer, 157 U. S., 655.
Kohl v. Lehlback, 160 U. S., 296.

(c) It is further contended that the judgment is void because the punishment is cruel and unusual as defined by the Constitution of North Carolina.

It was expressly held in *O'Neil v. Vermont,* 144 U. S., 323, that the question as to whether or not the punishment of a criminal is cruel or unusual under the Constitution and laws of a State is not a Federal one.

(d) It is further contended that the punishment is violative of the Eighth Amendment of the Federal Constitution.

The Eighth Amendment is inapplicable to the States, and applies only to Federal action.

O'Neil v. Vermont, 144 U. S., 323.
Barron v. Baltimore, 7 Pet., 243.
Peryear v. Massachusetts, 5 Wall., 475.
Ex parte Kemmler, 136 U. S., 436.
Davis v. Texas, 139 U. S., 651.

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FIFTH ASSIGNMENT OF ERROR.

The fifth assignment of error is that a conspiracy to cheat and defraud is not a criminal offense in North Carolina.

Decision of State Court as to Existence of Law Conclusive.

The petitioners contend that there is no statute or provision of the common law which makes their conduct indictable in North Carolina, and that there being no criminal offense, they are held without due process of law.

It is not contended that if such a law exists it contravenes any provision of the Federal Constitution. The Legislature clearly has the right to pass such a law. The only question is, does such a law exist?

In the case of *Duncan v. McCall,* 139 U. S., 449, the petitioner contended that there was no act in the State of Texas making the offense of which he was charged indictable, and that for that reason "he was deprived of his liberty without due process of law and denied the equal protection of the laws." He contended that the statute was void because it had not been enacted in accordance with the requirements of the Constitution of Texas.

The following is the head-note of the decision:

"2. The decision of the State Courts on the question as to what are the laws of a State is binding upon those of the United States."

"3. Whether certain statutes of a State have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States and raises no Federal question giving the Courts of the United States jurisdiction."

In the case of *Leeper v. Texas,* 139 U. S., 462, Mr. Chief Justice Fuller, in speaking for the Court, said:

"It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken. * * *

"That whether statutes of a Legislature of a State have been

duly enacted in accordance with the requirements of the Constitution of such State is not a Federal question, and the decision of State Courts as to what are the laws of the State is binding upon the Courts of the United States. *South Ottawa v. Perkins*, 94 U. S., 260, 268 (24: 154, 157); *Post v. Kendall County Sup'rs*, 105 U. S., 667 (26: 1204); *Norton v. Shelby County*, 118 U. S., 425, 440 (30: 178, 185); *Atlantic & G. R. Co. v. Georgia*, 98 U. S., 359, 366 (25: 185, 188); *Baldwin v. Kansas*, 129 U. S., 52, 57 (32: 640, 642). That by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons or classes of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied."

The Supreme Court of North Carolina, in *State v. Brady*, 107 N. C., 822, decided that an indictment of the same character as that upon which petitioners were tried and convicted was good, and charged an offense against the criminal laws of North Carolina, citing other North Carolina authorities to sustain the position of the Court. Brady's case has been subsequently cited with approval nine times. As early as December Term, 1827, the Supreme Court of North Carolina had declared conspiracy to cheat and defraud to be a crime in this State. *State v. Younger*, 12 N. C. R., 357.

In the case of *Caldwell v. Texas*, 137 U. S., 691, the writ of error had been granted to the Court of Appeals of Texas upon the ground "that the indictment is fatally and fundamentally defective and void under the Constitution of the State and does not, either in form or substance, set out a valid charge of murder or any other offense known to the criminal law of the State, and is not due process of law under the Fourteenth Amendment of the Constitution of the United States." The writ of error was dismissed, on motion. Mr. Chief Justice Fuller, delivering the opinion, said:

"By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no

State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requirement is satisfied. 2 Kent. Com., 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank v. Oakley*, 17 U. S., 244. The powers of the State must be exercised within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. *Hurtado v. California*, 110 U. S., 516. No question of repugnancy to the Federal Constitution can be fairly said to arise when the enquiry of the State Courts is directed to the sufficiency of an indictment in the ordinary administration of the criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to." * * *

See also authorities cited under second assignment of error.

OTHER QUESTIONS.

The appellants present several other objections, either in their petition for a writ of *habeas corpus* and writ of error, or in their brief.

One relates to the question of whether they should be imprisoned in the penitentiary, or sentenced to work on the highways of Guilford county. This question was first presented in the rejoinder to the answer to the writ of *habeas corpus*.

The statute in direct terms gives the Judge discretion as to the place of imprisonment.

In the case of *Davis v. Burke*, 179 U. S., 404, it was decided that the place of execution did not present a Federal question.

The validity of a sentence under a State law will not be reviewed by the Supreme Court. *Storti v. Massachusetts*, 183 U. S., 142.

The appellants object that there was a misjoiner in the original bill of indictment which contained three counts. At the

close of the evidence, two of them were *nol prossed* and used as bills of particulars upon the first count.

It was held that a Federal question was not presented by the suggestion of a misjoinder of counts in the indictment in the case of *McDonald v. Massachusetts*, 180 U. S., 313.

The instruction that the jury might find the defendant guilty if satisfied that he had killed and murdered, "in the manner and form charged in either of the counts," though one was bad, does not violate the Constitution of the United States so as to give jurisdiction to the Supreme Court. *Brooks v. Missouri*, 124 U. S., 396.

The appellants further contend that the Judge in imposing the sentence increased the term to imprisonment because of facts pertaining to the previous history of the defendants which he himself heard.

It was held in *State v. Wilson*, 121 N. C., 654, that in a charge for conspiracy to seduce a woman the previous character of the defendant ought justly and properly to be considered in passing sentence.

It was held in *Moore v. Missouri*, 159 U. S., 673, that an increased severity of punishment for the second offense is not a second punishment for the first offense.

In *State v. Hamby*, 126 N. C., 1066, the case of *State v. Wilson, supra*, is affirmed, and the right of the Judge to take into consideration the past record of defendant is sustained. See also *State v. Davidson*, 124 N. C., 844.

CONCLUSION.

We conclude this brief by making the following quotation from the opinion of the Court, written by Mr. Chief Justice Fuller, in the case of *Lambert v. Barrett*, 157 U. S. 697:

"With the disposition of State questions by the appropriate State authorities, it is not the province of this Court to interfere, and there is no basis for the suggestion of any violation of the Constitution of the United States; the denial of due process of law; or deprivation of any right, privilege, or immu-

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nity secured to him by the Constitution or laws of the United States."

Hallinger v. Davis, 146 U. S., 314, (36: 986).
Ex parte Kemmler, 136 U. S., 346, (34: 519).
Caldwell v. Texas, 137 U. S., 692, (34: 816).
Ex parte Converse, 137 U. S., 624, (34: 796).
McNulty v. California, 149 U. S., 645, (37: 882).

The fifth assignment of error will be made the subject of a supplemental brief.

ROBERT D. GILMER,
Attorney-General of North Carolina.

THOMAS B. WOMACK,
Of Counsel for Defendant.

FILE COPY

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

J. L. HOWARD, *alias* FRANK THOMPSON, A. L. BAILY, *alias* GOMEZ BONO, and H. D. HAWLEY, Plaintiffs in Error,

versus

THE STATE OF NORTH CAROLINA.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

J. L. HOWARD, *alias* FRANK THOMPSON; A. L. DALY, *alias* GONEZ BONO, and H. D. HAWLEY, PLAINTIFFS IN ERROR,

versus

THE STATE OF NORTH CAROLINA.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

The fifth assignment of error is as follows (Record, page 54):

The Court erred in not finding as a fact and holding as its judgment that "conspiracy to cheat and defraud" was and is not an offense known to the law of North Carolina, statutory or other, or justiciable or punishable by its courts; and that in consequence the indictment, conviction, judgment, sentence by said Guilford Superior Court and its affirmance by the Supreme Court of North Carolina was not due process of law, and the detention and confinement of J. L. Howard, A. L. Daly and H. D. Hawley thereunder in the penitentiary of said State was a denial to J. L. Howard, A. L. Daly and H. D. Hawley the equal protection of the laws of North Carolina by the courts thereof, and void under the laws thereof, and in contravention of the Fourteenth Amendment to the Constitution of the United States, and in not discharging J. L. Howard, A. L. Daly and H. D. Hawley from confinement and detention in the penitentiary of North Carolina and from the custody of Captain J. M. Fleming, Warden thereof.

With reference to the Statute 33d Edward 1st *de conspiritoribus*, his Honor Council charged the jury as follows:

"Its existence can be traced back centuries prior to our independence, and such eminent ancient law writers as Coke, Hawkins and others refer in their works to the existence of this crime prior to the passage of the Statute 23d Edward 1st *de conspirito-*

ribus, which statute has been commented upon by counsel for the defendants. Law writers upon the subject of conspiracy generally agree that the statute referred to was only declaratory of the common law to the extent of the crimes enumerated in the act, leaving the common law as applicable to all other forms of conspiracy known to the law."

The books are full of cases sustaining his Honor's view of the law of conspiracy. We shall cite only a few.

State v. Buchanan, 5 Harris and Johnson (Maryland), page 317, is an elaborate discussion of the question, covering fifty pages, and many authorities are cited. In this case, at page 333, the Court says: "Much reliance is placed on the statute of Edward 1st *de conspiritoriabus* on the supposition that the offense of conspiracy was originally created by that statute." The learned Judge then proceeds to show (pages 333-351) that the offense of conspiracy existed prior to the passage of 33d Edward 1st (which, by the way, appears from statutes at large from Magna Charta to Henry 6th, Vol. 1st, page 149, was passed in 1304 instead of 1305), and on page 351 observes: "By a course of decisions running through a space of more than four hundred years from the reign of Edward 1st to the 59th of George 3d, without a single conflicting adjudication, these points are clearly settled:

"1st. That the offense of conspiracy is of common law origin and not restricted or abridged by the Statute 33d Edward 1st.

"2d. That a conspiracy to do any act that is criminal *per se* is an indictable offense at common law, for which it can scarcely be necessary to offer any authority."

In *State v. Burnham,* 15 New Hamp., 396, Gilchrist, J., speaking for the Court, says: "In the first place, we have no doubt that conspiracy is an indictable offense in this State. It is punishable at common law, its punishment is most repugnant to our institutions, and it is an offense productive of much injury and as deserving reprehension under one form of government as another."

To the same effect are the following cases:

Commonwealth v. Hunt, 45 Mass. (4th Met.), 111.

State v. Pulle, 12 Minn., 164.

In the last case the defendants were indicted for a conspiracy to assault one James H. Murray, to daub and put upon his naked body a great quantity of tar and feathers, and the point was made "that there is no statute in this State creating or defining the crime of conspiracy, nor is any punishment affixed by law to any such offense, and therefore this Court had no jurisdiction thereof. The Supreme Court held on appeal that conspiracy not declared a crime by the statute law was punishable because of the common law."

In *United States v. McCord*, 72 Fed. Rep., 159, it is said: "The statutes of the United States do not define what a conspiracy is, or create any new offense. They merely recognize the crime of conspiracy as known to the common law, and the courts must go to the common law to determine what it is."

In Bishop's New Criminal Law, section 174, Vol. II, the Statute of 33d Edward I. is quoted in full, and the author adds, in subsection 2, section 174, the following:

"Since this statute contains no negative word, a principle explained in another connection shows that it abrogates nothing of the prior common law, but leaves indictable whatever of conspiracy was so before."

In *State v. Younger*, 12 N. C., 357, Mr. Chief Justice Taylor declared:

"Conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person, by perjury and a perversion of the law. But it is certain that modern cases have extended the doctrine far beyond the old rule of law, and it has long been established that every conspiracy to injure individuals, or to do acts which are unlawful or prejudicial to the community, is a conspiracy and indictable—as where divers persons confederate together by indirect means to impoverish another, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter, whether it is true or false. 1 Hawk. N. C., 446, sec. 2. Playing at cards for money is in itself unlawful, and where two persons conspire together to make an unlawful act the means of doing an injury to or impoverishing another, it is stronger than many of the

cases which have been held indictable. Even a bare conspiracy to do a lawful act, to an unlawful end, has been held indictable, though no act was done in consequence thereof. 8 Mod., 321."

See also *State v. Brady*, 107 N. C. R., 822.
State v. Powell, 121 N. C. R., 635.

"According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent, by their combined power, to wrong others or to prejudice the rights of the public, is in itself illegal, though nothing be actually done in execution of such conspiracy. This is fundamental in our jurisprudence." Mr. Justice Harlan, in *Arthur v. Oakes*, 63 Fed. Rep., 321.

In *Farmers Loan and Trust Co. v. Northern Pacific Railroad Co.*, 60 Fed. Rep., 817, it is said:

"These statutes are declaratory of the common law and wholly condemn all conspiracies to injure or oppress or to interfere with the rights of others."

Statutes against conspiracies are merely declaratory of the common law.

Hawkins' Pleas of the Crown, ch. 27, sec. 2.
Rex v. Eccles, 1 Leach, 274.
Chitty Cr. Law, 1139.
Archibald Criminal Practice and Pleading, 1829.
Queen v. Kendrick, 5 Q. B. D., 49.

Authorities in this country to the same effect might be multiplied indefinitely. For example, see

Crump v. Commonwealth, 84 Va., 927.
State v. Stewart, 59 Vt., 273.
State v. Donnelson, 32 N. J. L., 151, 156.
State v. Glidden, 55 Conn., 46.
People v. Petheram, 64 Mich., 252.
State v. Burnham, 15 N. H., 403.
Commonwealth v. Carlisle, Brightly, 36.

ROBERT D. GILMER,
Attorney-General of North Carolina.

THOMAS B. WOMACK,
Of Counsel for Defendant.

FILE COPY. 5399

Supreme Court of the United States.

OCTOBER TERM, 1903.

Office Supreme Court U. S.
FILED
OCT 26 1903
JAMES H. McKENNEY,
Clerk.

Nos. 44 and 45.

HOWARD ET AL. *vs.* FLEMING, ETC.,

AND

HOWARD ET AL. *vs.* NORTH CAROLINA.

Motion of Appellants and Plaintiffs in Error.

Come now appellants and plaintiffs in error, by their counsel, Frank P. Blair and Leslie A. Gilmore, and move the court for an order committing them to the custody of the marshal of this court, and that they be enlarged therefrom pending the further disposition of their said causes in this court upon the giving of a reasonable bail, and urge in support of this motion the affidavit of Leslie A. Gilmore annexed hereto and the records and briefs filed herein.

FRANK P. BLAIR,
LESLIE A. GILMORE,
Attorneys for Appellants and Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1903.

Nos. 44 and 45.

HOWARD ET AL.
vs.
FLEMING, ETC.,

and

HOWARD ET AL.
vs.
NORTH CAROLINA.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Leslie A. Gilmore, of lawful age, being first duly sworn, deposes and says that he is of counsel for said appellants and plaintiffs in error, and in their behalf makes this affidavit.

Deponent further says that said H. D. Hawley is in the custody of said J. M. Fleming, at Raleigh, and said J. L. Howard is in custody of C. N. Christian, an official under said Fleming, at Tillery, in said State.

That said Hawley and Howard have been wrongfully deprived of liberty by the authorities of North Carolina since March 23, 1901.

That motion under rule 34 for bail pending appeal of the *habeas corpus* proceedings herein was made to the United States circuit court, which granted the writ, and which motion was opposed by Special Attorney General Thomas B. Womack and the governor of North Carolina, with the suggestion that the said United States circuit court had no

authority to enter such order, and that "appellants would not be liberated if bond was given," and the motion, without being denied by the court, was held up to await the sanction of the said governor to an order for bail.

Affiant further says that the prejudice in said State against said appellants is very strong, and that unless the marshal of this court takes custody of said appellants, H. D. Hawley and J. L. Howard, pending the further determination of their said causes in this court, and have them before this court when decision thereof is rendered, that the order of this court, should it be made for their discharge, will be defeated by the infliction of other wrongs and oppressions upon them by the authorities or by a mob of North Carolina.

Affiant further says that said appellants and plaintiffs in error can give a reasonable bail for their appearance.

LESLIE A. GILMORE.

Subscribed and sworn to before me this 26th day of October, 1903.

JAS. H. MCKENNEY,

[SEAL.] *Clerk of United States Supreme Court.*

Supreme Court of the United States.

Nos. 44 and 45.—October Term, 1903.

44 J. L. Howard, alias Frank Thompson; A. L. Daly, alias Gonez Bono, and H. D. Hawley, Appellants, *vs.* Captain J. M. Fleming, Warden of State's Prison of North Carolina. — Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

45 J. L. Howard, alias Frank Thompson; A. L. Daly, alias Gonez Bono, and H. D. Hawley, Plaintiffs in Error, *vs.* The State of North Carolina. — In error to the Supreme Court of the State of North Carolina.

[November 16, 1903.]

At the June term, 1901, of the Superior Court of Guilford County, North Carolina, the three parties named as appellants in the first of these cases and as plaintiffs in error in the second were indicted, tried and convicted of the crime of conspiracy. Daly was sentenced to the penitentiary for seven years and the other two for ten years each. All appealed to the Supreme Court of the State, by which court the judgment was affirmed, (129 North Carolina, 584,) and thereupon the writ of error in the last case was issued. A writ of *habeas corpus* was also sued out from the Circuit Court of the United States for the Eastern District of North Carolina, directed to the warden of the State prison, which, after hearing, was dismissed, and from such dismissal an appeal was taken to this court; and that is the first of the above cases.

Mr. Justice Brewer delivered the opinion of the Court.

Although these are separate cases, coming from different courts, we shall consider them together, for the same proceedings are challenged in each.

We premise that the trial was had in a State court, and therefore our range of inquiry is not so broad as it would be if it had been in one of the courts of the United States. The highest court of the State has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the Federal Constitution was denied and the proper steps taken to preserve for our consideration the question of that denial.

The first contention demanding notice is that the indictment charged no crime. As found it contained three counts, but the two latter were

abandoned, and therefore the inquiry is limited to the sufficiency of the first. That charged a conspiracy to defraud. There is in North Carolina no statute defining or punishing such a crime, but the Supreme Court held that it was a common law offense, and as such cognizable in the courts of the State. In other words, the Supreme Court decided that a conspiracy to defraud was a crime punishable under the laws of the State, and that the indictment sufficiently charged the offense. Whether there be such an offense is not a Federal question, and the decision of the Supreme Court is conclusive upon the matter. Neither are we at liberty to inquire whether the indictment sufficiently charged the offense. (*Caldwell* v. *Texas*, 137 U. S. 692, 698; *Davis* v. *Texas*, 139 U. S. 651, 652; *Bergemann* v. *Baker*, 157 U. S. 655.)

Again, it is contended that the defendants were denied the equal protection of the laws, in that the sentence was more severe than ever before inflicted in North Carolina for a like offense, and was cruel and unusual; in that two were given ten years and the third only seven years' imprisonment, and also in that they were sentenced to imprisonment in the penitentiary instead of to hard labor on the public roads. No case of a similar offense is cited from the judicial reports of North Carolina, and the Supreme Court in its opinion refers to the crime as "a fashion of swindling, which has doubtless been little practiced in this State." That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one. Swindling by means of a pretended gold brick is no trifling crime, and a conspiracy to defraud by such means does not commend itself to sympathy or leniency. But it is unnecessary to attempt to lay down any rule for determining exactly what is necessary to render a punishment cruel and unusual or under what circumstances this court will interfere with the decision of a State court in respect thereto. It is enough to refer to *In re Kemmler*, (136 U. S. 436,) in which these questions were discussed, and to say that a sentence of ten years for an offense of the nature disclosed by the testimony, especially after it has been sustained by the Supreme Court of a State, does not seem to us deserving to be called cruel. If the effect of this sentence is to induce like criminals to avoid its territory, North Carolina is to be congratulated, not condemned. Doubtless there were sufficient reasons for giving to one of the conspirators a less term than the others. At any rate, there is no such inequality as will justify us in setting aside the judgment against the two.

So far as respects the sentence of the defendants to the penitentiary instead of to work on the public roads, section 4, chap. 355, p. 631, Laws N. C. 1887, in terms warrants it, for that provides that when the judge presiding

is satisfied that there is good reason to fear an attempt to release or injure any person convicted of any of the offenses, for which sentences to work on the public roads may be imposed, it shall be lawful for him to sentence to imprisonment in the penitentiary. It is true there is no recital of any such reason to fear, but we cannot hold in the face of the decision of the Supreme Court of the State that the omission of such recital invalidates the judgment.

Again, it is said that there was not due process, because the trial judge refused to instruct the jury on the presumption of innocence. He did charge that the guilt of the accused must be shown beyond a reasonable doubt, and that on a failure in this respect it was the duty to acquit. He also explained what is meant by the term "reasonable doubt." The Supreme Court sustained the charge. Of course, that is a decision of the highest court of the State that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt and that an omission to refer to any presumption of innocence does not invalidate the proceedings. In the face of this ruling as to the law of the State, the omission in a State trial of any reference to the presumption of innocence cannot be regarded as a denial of due process of law.

These are the principal matters presented by counsel. Some of them were argued elaborately both in brief and orally; especially that in reference to the absence of any statute providing for the punishment of conspiracy, and the alleged absence of any common law offense of that nature. We have not deemed it necessary to review the various authorities, or enter upon any discussion of the matter, because we are of opinion that the decision of the Supreme Court of the State in reference thereto is conclusive upon us.

It does not appear that the Federal character of the questions was presented to the Supreme Court of the State, although in the opinions of the Supreme Court the questions themselves were fully discussed. But in the absence of any claim to protection under the Federal Constitution, we are compelled to hold that we have no jurisdiction in the case coming from the Supreme Court of the State, and the writ of error will be

Dismissed.

The same questions were presented in the *habeas corpus* case, and as that comes to us from a Federal court we have jurisdiction, and in that case the judgment will be

Affirmed.

The motions in respect to change of custody of the defendants will, in view of the conclusion on the merits of the cases, be denied.

Mr. Justice HARLAN concurs in the result.